

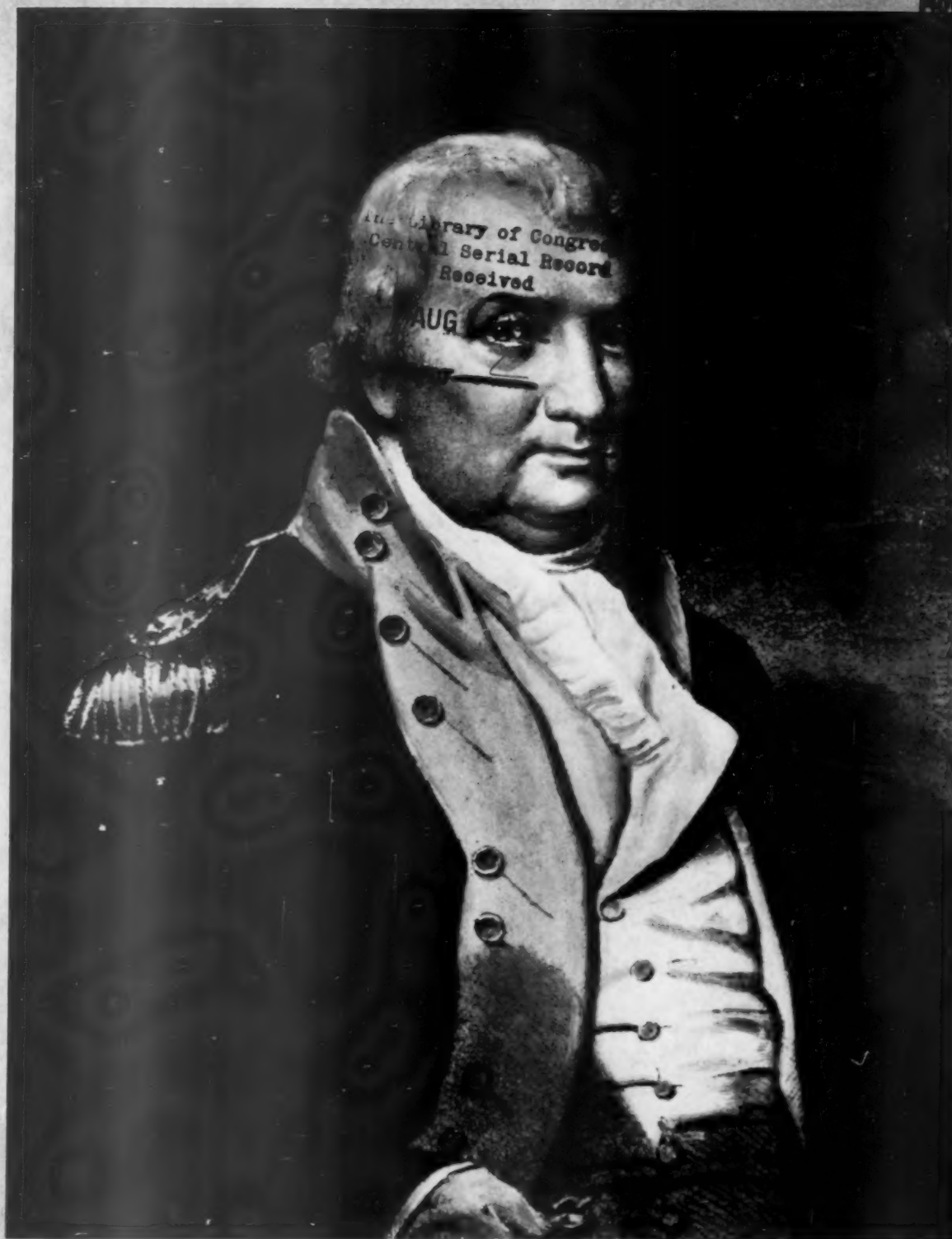
Law

LAW REF.

AUG 11 1942

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E. A. BROWN



CHARLES COTESWORTH PINCKNEY

[see page IV]

AMERICAN BAR ASSOCIATION JOURNAL

August

1942



From Print by N. Currier



Mrs. Bloomer Pulled No Bloomer

THEY LAUGHED, a century ago, when Mrs. Amelia Bloomer, editor of the gentle periodical, *The Lily*, advocated bifurcated apparel for the ladies. Men in britches went into stitches as Mrs. Bloomer, sounding her battle cry of "Equal Rights for Women", appeared attired in voluminous trousers. Her pants were as much a sensation as her preachments.

But Mrs. Bloomer pulled no bloomer. She was simply ahead of her time. Her attitude toward the so-called prerogatives of the male sex has been vindicated. Today, women are privileged to vote like men and, if they care to, to dress like men. Face the facts: They've won their slacks.

With the democratic world engaged in a struggle to defeat the foes of all personal rights, with women working side by side with men on the assembly line and even fighting shoulder to shoulder with men on the battle line, it's no time to talk about "masculine prerogatives".

It's no longer a man's world. Women have won many

prerogatives that were once reserved for the male sex. Today, at least a third of America's adult feminine population is engaged in gainful occupation.

Among the prerogatives of the modern American woman is the privilege of owning her own insurance.

She has her own Life Insurance to secure the financial welfare of herself and those partially or wholly dependent on her income. She has her own Accident Insurance to keep income coming in, for women, of course, are no more immune to accidental injury than men are. She has her own Automobile Insurance to fulfill the financial responsibility incumbent on owning her own car. She has her own Fire Insurance to cover the loss of her own property by fire, and she has such forms of insurance protection as Personal Effects, Jewelry and Furs.

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THE  INVITES...

...you and your friends, who expect to attend the National Conference on Uniform State Laws or the Annual Convention of the American Bar Association, to be held in Detroit from August 18th to August 27th, to use the facilities of the Secretarial Bureau, which we shall maintain as usual in connection with these meetings.



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Yes— they could do it then—

Time was, true enough, when lawyers could get a corporation qualified in most states simply by filing the application and certified copy of charter and sending a check for entrance fees; when they could keep a company in good standing simply by filing the annual report and paying the franchise tax.

—but nowadays!

—a network of different requirements: Publication—of intention to file in some states, or of the charter in others, or of a "synopsis" of the charter in still others . . . filing extra certified copies in county offices in some states, special certificates in others . . . an anti-trust affidavit to be furnished here . . . date on which company commenced business in the state over there, in some the names and addresses of stockholders! . . . AND AFTER QUALIFICATION . . . look after occupation license tax in one state, income tax in another, use tax here and corporate excess tax there . . . sales taxes, intangible property taxes, "business" taxes . . . annual capital stock return, annual "foreign bonus report," report of change in stated capital and surplus, annual report of dividends paid to residents, registry statement, annual certificate of condition . . .

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Dover, Del. 30 Dover Green	Washington 1329 E St. N.W.
Hartford 50 State Street	Wilmington 100 West 10th Street

IN THIS ISSUE

Our Cover—We begin a new series of covers in which we portray eminent lawyer-soldiers. Our picture is from an engraving by E. Wellmore after the miniature by Edward Greene Malbone. Charles Cotesworth Pinckney was born at Charleston, South Carolina, February 25, 1746. He was educated in England at Westminster School and Christ Church, Oxford, after which he prepared for the bar at the Middle Temple and, returning to America, began practice in his native town. He served in the Revolutionary War, retiring with the rank of brigadier general. He took part in the Constitutional Convention and was responsible for the clause abolishing religious tests as a qualification for office. He was one of the special envoys to France on the "XYZ mission." The "XYZ" affair was the most dramatic incident in the dispute between the French Directory and the United States. Incensed at our negotiation of Jay's Treaty with Great Britain, France issued decrees against American shipping and refused to receive Pinckney, the American Minister. President John Adams held to a pacific course and sent a mission to Paris composed of Pinckney, then in Holland, John Marshall and Elbridge Gerry, and the difficulty was soon cleared away.

The Function of the Judicial Conference—Judicial Conferences are comparatively recent organizations. Only nineteen years ago the Supreme Court of the United States began the Conferences which, in 1940, were given a definite status by Congress. The Twelfth Annual Conference of the Fourth Judicial Circuit was held at Asheville, June 19 and at that Conference, Chief Justice Stone delivered a message both relevant and helpful.

Function of Supreme Court's Federal Rules Committee—Judge Charles E. Clark, Reporter of the Advisory Com-

mittee on Rules of Civil Procedure, has written a challenging article in which he expresses his individual views as to the future function of the reconstituted Advisory Committee.

Mr. Justice Roberts' Radio Message—We devote one of our editorial pages to Mr. Associate Justice Roberts' notable radio broadcast, spoken over a nation wide hook-up. It is the voice of one chosen from our own number for membership on our highest judicial body.

Members of our profession will gather from Mr. Justice Roberts' notable utterances, inspiration for the lawyer's peculiar province—the guidance of those who rely on his advice.

Constitutional Problems—Former Dean John Henry Wigmore of Northwestern University contributes a notable collection of precedents under which the nations of the world have agreed on matters affecting their mutual interests. He lists five groups of problems likely to arise after victory has been accomplished.

The Volume of Published Opinions—This ever-recurring problem is here treated from a new and practical point of view in an address delivered by Judge John D. Martin of the United States Circuit Court of Appeals, Sixth Circuit.

Ross Essay—The Ross Essay competition has proved this year, as it has in the past, a fruitful source of information for the bar. We print a discussion of desirable changes in the field of labor relations law by Howard G. Fuller of the Fargo, North Dakota Bar.

War Notes—Many requests have come for the institution of a new department in which may be found

by our readers, particularly those on committees of state and local bar associations charged with war work activities, information on what is being done and can be done to assist in the war effort. Tappan Gregory of the Chicago Bar, a member of our Committee on War Work, has agreed to assume responsibility for this department and the first installment appears in this issue.

Review of Supreme Court Decisions—This month we complete the publication of our reviews of Supreme Court decisions rendered before the adjournment of the Court for the term. Among those reviews is one of a reversal of a conviction of an ignorant negro held incommunicado and without benefit of counsel.

In another case denial of a request for appointment of counsel to represent one indicted for robbery in a state criminal court (Maryland) was held not to be obnoxious to the due process clause of the Fourteenth Amendment, since that Amendment does not require states to apply in their criminal procedures the requirements of federal procedure guaranteed by the Sixth Amendment.

A declaratory judgment case came before the Court in which the district court had dismissed a petition for a declaratory judgment and the circuit court held the dismissal to be an abuse of discretion and reversed the judgment. The Supreme Court holds that the circuit court must be reversed and the case remanded to the district court for the proper exercise of the district court's discretion.

The Oklahoma Habitual Criminal Sterilization Act was held to be violative of the equal protection clause of the Fourteenth Amendment and is therefore unconstitutional, the fault being that the form of the Oklahoma statute established different tests for felonies which fell into like categories and should be treated alike.

POTIUS IGNORATIO JURIS LITIGIOSA EST, QUAM SCIENTIA

WILLIAM CRANCH, Assistant Judge of the Circuit Court of the District of Columbia, and the reporter for volumes 5 to 13 of the United States Supreme Court Reports which cover the critical years of 1801-1815, used the above quotation from Cicero on the title pages of the nine volumes of reports he edited.

Freely translated it means that,

Misunderstanding of the law is a more fruitful source of litigation than knowledge of the law.

Justice Cranch knew that lawbooks were necessary to avoid a misunderstanding of the law, so he borrowed from the Latin this phrase to drive home his point.

Lawyers today through their bar associations, their judicial councils, and their integrated bar committees, are particularly concerned with the problem of finding ways to curb wasteful litigation.

AMERICAN JURISPRUDENCE
has a definite place in helping the lawyer understand the law. It has been developed to provide a quick reference work which gives:

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CURRENT EVENTS

Associate Justice George Sutherland Dies

RETIRED Associate Justice George Sutherland of the Supreme Court of the United States was buried Wednesday, July 22, in Abbey Mausoleum, Arlington, Virginia after funeral services at the Washington Cathedral. The services were conducted by the Right Rev. James E. Freeman, Bishop of Washington.

The Court was represented by Justice McReynolds, retired, Justices Roberts and Black; also the Clerk and his staff, the Marshal and his staff, and the Official Reporter.

President Armstrong appointed the following committee to represent the American Bar Association: William P. MacCracken, Chairman, Frank J. Hogan, George Maurice Morris, George Hamilton, Sr., Henry I. Quinn and Wilbur Gray.

National Association of Legal Aid Organizations

THE National Association of Legal Aid Organizations will hold its 20th annual conference in Milwaukee, Wisconsin, September 23-25. Among the speakers for whom arrangements have been made are Walter Finke, national president of the United States Junior Chamber of Commerce, who has charge of field operations for the Office of Civilian Defense at Minneapolis; Dean Lloyd K. Garrison of the University of Wisconsin; George Scott Stewart, Jr., chief attorney for the Philadelphia Legal Aid Society; Mr. Gerald Monsman, executive attorney for the Baltimore Legal Aid Bureau; Miss Nellie McNamara, director of Legal Clinics of Northwestern University; and Miss Elizabeth A. Campbell, executive secretary of the Milwaukee International Institute.

The importance of the work of the national association throughout the country as a responsibility of the legal profession cannot be overestimated at this time. In view of the difficulties which are being encountered by people who for one reason or another qualify for the services of these organizations, a program has been arranged which will deal with matters of current importance in the legal aid field.

Competitive Examination of the Federal Board of Legal Examiners

THE Board of Legal Examiners of the Federal Civil Service Commission, concerning the continuance of which a prolonged controversy occurred in Congress during the winter and spring, is launching its permanent program after the granting of an appropriation of \$80,000 for the current fiscal year. Pending the outcome of the Congressional deliberations, the Board had confined its supervision of federal legal appointments to passing noncompetitively upon the professional qualifications of attorneys nominated by government agencies.

Of immediate nation-wide significance to the bar is the Board's first competitive examination, the written portion of which will be given Saturday, September 26. The closing date for receipt of applications is August 21. The register resulting from the examination will apply to government attorney positions ranging in salary from \$1800, for law clerk trainees who possess law degrees but have not yet been admitted to the bar, to \$3200 for associate attorneys possessing not less than 18 months of professional experience. Intermediate grades are those of junior attorney, requiring admission to the bar

and paying \$2000, and assistant attorney, requiring one year of experience and paying \$2600. Positions in the higher grades, ranging in salary from \$3800 through \$8000, will continue indefinitely to be filled through nomination by the agencies, subject to the approval of the Board.

Uncertainty concerning the Board's status caused the postponement of the competitive examination last February after it had been announced informally for March 23. Now as then, the written portion of the examination, which will last six hours, is announced as only the first portion of the entire test. The other parts are an examination of the professional records of applicants and, for each applicant who is not eliminated in the first two parts, an oral interview before a three-member committee of lawyers in his vicinity. At least fifty such committees, composed of outstanding members of the bar, will be established for this purpose throughout the country. Thus it will not be necessary for lawyers to come to Washington in order to qualify fully for federal positions.

War conditions have caused an expansion of government legal work and an enhanced turnover of personnel. All appointments are now being made on a "war service" basis, "for the duration of the war and six months thereafter." Eight hundred eighty-eight such appointments have been made since March 16. With many younger lawyers entering the armed services, the need for older lawyers to serve during the emergency is increasing. With this in mind, the competitive examination will be thrown open without reference to a maximum age.

Detailed information concerning the examination may be obtained from any first- or second-class post office and from the Civil Service Commission's district and field offices. Applications must reach the Commission in Washington by the closing date.

CURRENT EVENTS



GEORGE B. ROSE

George B. Rose

GEORGE B. ROSE of Little Rock, Arkansas, a member of the American Bar Association since 1898, died on July 10, 1942, his eighty-second birthday. Mr. Rose was the son of Judge U. M. Rose, who was President of the American Bar Association, 1901-1902, and was appointed United States delegate to the second Hague Peace Conference in 1907 by President Theodore Roosevelt.

Mr. Rose was admitted to the Bar in 1879 and since that time has been in practice in Little Rock. He has made many trips to Europe in the study of Renaissance art and was the author of the book, "Renaissance Masters—Art of Raphael, Michelangelo, Leonardo da Vinci, Titian, Correggio, Botticelli, Rubens and Claude Lorraine," published in 1898, 1900 and 1908. He also wrote "The World's Leading Painters," published in 1911, and numerous articles.

Mr. Rose rarely missed a meeting of the American Bar Association and served on many important committees. For many years he was a commissioner from Arkansas on the National Conference of Commissioners on Uniform State Laws and at one time served as vice president of that organization. He was also a charter member of the American Law Institute.

A member of the Arkansas Bar has expressed the esteem with which he was held in these words: "Mr. Rose's profound cultural and intellectual background is rare these days when people are too hurried to acquire more than a superficial smattering of art and literature." He was a gentleman, a careful student and the heir of the traditions of learning.

He is survived by one son, Clarence Edward Rose of Washington, D. C. Mrs. Rose died in 1935.

English Law Students in War Time

SOME interesting statistics relating to the decline in the number of admissions of students to the Inns of Court and the Law Society in consequence of the war have just been received from H. A. C. Sturgess, Librarian of the Middle Temple, London, England. The tables in each case include the figures for the last complete year of peace preceding each war.

WAR OF 1914-1918				
Admissions				
	Middle Temple	Inner Temple	Lincoln's Inn	Gray's Inn
1913	106	161	87	81
1914	89	108	30	67
1915	51	52	20	45
1916	48	35	4	45
1917	39	33	8	29
1918	73	37	21	29

PRESENT WAR				
Admissions				
	Middle Temple	Inner Temple	Lincoln's Inn	Gray's Inn
1938	165	126	69	103
1939	98	55	43	74
1940	47	28	21	36
1941	53	32	34	66

The number of calls to the Bar during these periods may also be of interest, as follows:—

WAR OF 1914-1918				
	Middle Temple	Inner Temple	Lincoln's Inn	Gray's Inn
1913	166	125	130	82
1914	114	87	80	63
1915	62	37	63	41
1916	60	36	38	42
1917	52	34	20	30
1918	43	48	21	37

PRESENT WAR				
	Middle Temple	Inner Temple	Lincoln's Inn	Gray's Inn
1938	95	80	45	74
1939	121	84	47	67
1940	78	39	35	40
1941	61	29	34	32

In 1919, the first complete year of peace after the last war, the number

of admissions to the Inns of Court went up with a bound; they were:—Middle Temple 258; Inner Temple 160; Lincoln's Inn 54 and Gray's Inn 122.

Clerks admitted to Articles by the Law Society during the past four years were:—1938—788; 1939—530; 1940—324; 1941—284.

The Council of Legal Education has added to its regulations a clause which provides that when a student has been on war service during the present war the Council may, if satisfied with his educational and legal qualifications, recommend that he be exempted from the whole or part of the Bar examinations, subject to such conditions, if any, as to reading in Chambers, attendance at the Council's tutorial classes or otherwise as the Council may think desirable.

Bust of Justice Brandeis on exhibit

A portrait bust of Justice Brandeis is now on exhibition at the Metropolitan Museum of Art in New York City and will remain there until it is sent to Washington in September.

The bust will be presented to the Supreme Court in October. It is a striking likeness and a notable work of art, by Miss Eleanor Platt.

"The Unconquered People"

THE Office of War Information plans to send to each member of this Association a copy of its recent pamphlet entitled *The Unconquered People*. It is the hope of the Office of War Information that lawyers will place the pamphlet upon the reading tables in their waiting rooms in order that the publication may serve to increase knowledge of the issues of the war and of the valiant resistance being exhibited by the victims of our enemies. The JOURNAL is happy to lend its encouragement to the project by calling attention to the pamphlet.

FUNCTIONS OF THE CIRCUIT CONFERENCES*

By HONORABLE HARLAN FISKE STONE

The Chief Justice of the United States

It is with a sense of genuine pleasure that I come for the first time to attend the Judicial Conference for the Fourth Circuit. It has been a tradition, cherished at least since Marshall's time, that the Chief Justice should be designated as Circuit Justice for this circuit. I count myself fortunate in being able to continue that tradition, and this morning as I surveyed from this hilltop the beauties of this spacious landscape, I realized that not the least of the advantages of the maintenance of that tradition is the ability of the Fourth Circuit to choose so favored a spot for its conferences.

The 1941 Term

The Supreme Court has just brought its 1941 term to a close. In many respects it has been one of the most interesting and certainly the busiest in its long history. My friends among the judges of the various circuits have been telling me that judicial business in their circuits is falling off. But that certainly has not been the experience of the Supreme Court. During the term just ended the Court has had on its appellate docket 1290 cases, of which it was finally disposed of 1166, 187 more than were disposed of at the last term of Court. When we adjourned we had disposed of all cases ready for argument, with one possible exception, and there were remaining on our docket 124 numbered cases or, if we allow for duplication of numbers, 105, which is ten less than were on our docket at the end of the 1940 term. Three hundred and eighty-one of these cases were disposed of on their merits, 95 more than during the previous term. There were 951 applications for certiorari, 62 more than during the previous term. Of these we granted 166, actually 28 less than were granted during the previous year. As these statistics indicate there was a marked falling off in the quality of the applications.

Certiorari—Applications in *forma pauperis*— Civil Rights Cases

The Court has continued the practice, which has been followed at least during my seventeen years on the Bench, of having an independent examination of all applications made by each member of the Court, and in the case of applications for certiorari granting them if four of the nine judges favor the grant.

As has long been the practice, the Chief Justice

examines in the first instance the typewritten records in all applications in *forma pauperis*. Those which are found to present any question of substance are then circulated among all the members of the Court, after which they are considered and voted on at conference. The concern of the Court for the protection of civil rights has resulted in a large increase in this class of applications. During the term just ended I examined personally the records in 178 cases, 58 more than were filed in the previous term. But the merits of these applications have not kept pace with the increase in number. During this term we granted 16 of these applications as against 19 during the 1940 term.

Dissents

Work of the past year has presented some other interesting features. Any high expectations that the justices of the newly organized Court would have minds with but a single thought and hearts that beat as one were speedily dissipated. There have been quite a number of five to four decisions and a goodly number of dissents—more in fact than during any recent years, but not as many, I believe as at some other periods in the Court's history. To many it will be reassuring to know that there are still some rugged individualists on the Court, who strive for self-expression and to learn also, what is the fact, that these dissents represent intellectual but not personal differences of the justices.

While the dissenting opinion tends to break down a much cherished illusion of certainty in the law and of the infallibility of judges, it nevertheless has some useful purposes to serve. It is some assurance to counsel and to the public that decision has not been perfunctory, which is one of the most important objects of opinion-writing. Although in my time there have been some opinions of the Court which were originally written as dissents, the dissenting opinion is likely to be without any discernible influence in the case in which it is written. Its real influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law. A considered and well stated dissent sounds a warning note that legal doctrine must not be pressed too far. It sometimes, for better or for worse, arrests a trend and sometimes reverses it. Its appeal can properly be only to scholarship, history and reason, and if the business of judging is an intellectual process, as we are entitled to believe that it is, it must be capable of withstanding and surviving these critical tests.

*Remarks at the Twelfth Annual Judicial Conference of the Fourth Circuit, at Asheville, N. C., June 19, 1942.

FUNCTIONS OF THE CIRCUIT CONFERENCES

Rules of Procedure in Criminal Trials

A year ago the Court, acting with the authority of Congress, appointed a committee, headed by Mr. Arthur T. Vanderbilt of the New Jersey Bar, to draft rules of procedure in criminal trials. Later the committee was given like authority to revise existing rules governing criminal appeals. The committee has given itself diligently to the task of drafting the new rules and has made commendable progress. It had reason to hope that a first draft would be ready at this time for submission to the critical examination of Bench and Bar and for discussion at this and other Circuit Conferences. But there are many pitfalls and some unsuspected difficulties which must be avoided in establishing a new system of criminal procedure suitable to present-day needs. Although the committee has made substantial progress it has been thought that some added time for study, revision and annotation of the rules will be required before they are ready for the criticisms of Bench and Bar.

This Conference is a part, and an important one, of the system which Congress has set up for the administration of the federal courts. That system began with the organization of the Conference of Senior Circuit Judges. It was supplemented and greatly strengthened by the creation of the Administrative Office and the appointment of Mr. Chandler as Administrator, and finally by the organization of the Judicial Conferences in the several circuits. Together these constitute a democratically organized scheme for the administration of the federal courts. In its function it is comparable in many ways to the ministries of justice established in a number of European countries. Because its organization is democratic and those who wield its authority are close to the administrative problems which they must solve, it is, I think, capable of being developed into the most effective system yet devised.

Conference of Senior Circuit Judges

As the work of the Conference of Senior Circuit Judges has progressed it has become more and more evident that the recommendations which it will be called on to make for the better administration of justice in the federal courts will require painstaking study, and the aids to be derived from advice of the circuit and district judges, who are not members of the Conference, and from consultations with them. One of the functions of the circuit conferences is to give the Senior Circuit Judges the benefit of such counsel and advice. At the Conference of Senior Circuit Judges last September, several important questions were assigned

to committees for a study and report. A number of circuit and district judges not members of the Conference were appointed to those committees. Their reports are now coming in and it is desired that they be discussed at the various circuit conferences. One of them, the admirable report of the committee appointed to study the use of the indeterminate sentence in the federal courts, I am happy to say, will be the principal topic to be considered at this conference. Mr. Chandler, Director of the Administrative Office, is also making it a point to communicate to the judges various questions which are likely to be considered at our Conference next September, and it is hoped that these suggestions will also become the subject of discussion at the various circuit conferences and that when we meet next September we shall have the benefit of those discussions.

High Place of the District Court

You of course have your own local problems with which I am not very familiar, and it is an important function of these conferences to study the special local needs of the administration of justice in the federal courts. We have with us always the need of avoiding congestion of dockets and the accumulation of business and long delays in the disposition of cases. One of the most important concerns of any judiciary is its right relations with the public. No court can satisfy the public need for faith in the processes of justice, or can function with the highest efficiency without the support of public confidence. The public gains its impressions of the federal courts, not so much by what it knows of the Supreme Court or from the Circuit Courts of Appeals, as from its first-hand acquaintance with what goes on in the district courts. For it is there that the average citizen who comes into court, as witness, juror or suitor, sees with his own eyes how justice is administered. And so it is that the district courts are peculiarly the guardians of the right relationship between the federal courts and the public. That relationship is always strengthened by judicial punctuality, by dispatch in the handling of business, by dignity of judicial conduct and procedure, and by firmness tempered by courtesy in the contacts of judges and court officials with the public. These should be the attributes of courts as they are said to be of kings. And so I venture to express the hope that all the circuit conferences, in considering the procedure in the courts and the conduct of their business, will feel a special concern that the relations of the federal courts with the public shall be such as to command its confidence and respect. I am firmly of the belief that no single effort could accomplish so much toward maintaining unimpaired the dignity, the public influence and efficiency of the federal courts.

THE PROPER FUNCTION OF THE SUPREME COURT'S FEDERAL RULES COMMITTEE

By HON. CHARLES E. CLARK

United States Circuit Court of Appeals, Second Circuit

I HAVE been requested by the president of the American Bar Association to discuss the proper function of the Advisory Committee on Rules of Civil Procedure, recently reconstituted by order of the Supreme Court of the United States.¹ This I am particularly glad to do now, because the matter is the subject of the report and resolution of the Standing Committee on Jurisprudence and Law Reform to be offered to the forthcoming meeting of the Association. My views, which accord with this committee's proposal for an actively functioning committee, are the result of such careful thought as I can give them and represent rather strong personal convictions on my part; for caution's sake, I should add, however, that they are put forth as representing only my own opinions, and certainly not those of the Advisory Committee as a whole.

The arguments for a standing rules committee are so well known and have been stated so many times that I think they need not now be stressed. Indeed, they were referred to by the Advisory Committee in its original report to the Supreme Court in recommending a permanent committee.² That bridge has been passed. We have a permanent committee by the Court's order. But the question now is, How shall it operate? Shall it merely await the reference of matters to it by the Court? Or shall it, on the other hand, meet regularly at least once a year, and perhaps oftener, for the purpose of not merely passing upon suggested amendments, but also examining and reporting regularly on the operation of the rules and the status of federal procedure in general?

Two Schools of Thought

It will be observed that the difference is one of degree as to the amount of activity to be expected of the committee. Nevertheless, like most questions of degree in the law, it is practically important. How it is resolved will undoubtedly affect the course of federal rule-making for years. Two schools of thought have already developed as to the appropriate function of the committee, and in all probability there are various shades of opinion between the two. One school, which would consider the committee's activities limited to matters directly referred to it by the Court, places itself squarely upon the success of the rules and the fact that no

very serious or extensive defects, beyond those correctable by the process of judicial interpretation, have yet appeared. As forcibly stated by the protagonists of this view, there should not be continuous "tinkering" with the rules. Of course, "tinkering" under the circumstances is an emotive word which packs its own wallop. Those of us who do not hold to this view of course would say that we do not advocate tinkering, which we regard as an inappropriate description of what we do support, namely, administrative regulation of court procedure. Further, we are interested in court activities in procedure, as well as in other aspects of law administration, as not ends in themselves, but as means to the larger end of the more effective administration of substantive justice. In short, we advocate an active policy of continuous control and direction of the procedural functioning of the courts, not merely the negative policy of only sitting on the lid to head off and prevent all change.

Before entering upon a detailed presentation of this latter view, let me say at once that my ideas are advanced not because of a belief that there are many and substantial weaknesses in the rules at present. Rather are they based on the assured strength of the rules as demonstrated by the enthusiasm which they have aroused in the bench and bar of the country. If I feared that the rules had not established themselves sufficiently to withstand the slightest suggestion that they did not spell perfection, I might well hesitate to venture even limited suggestions for their improvement. It is because of their outstanding success, their universal acceptance as a vital part of our federal law, that we can afford to re-examine them impartially and judiciously. That the civil rules are doing the work of advancing and simplifying adjudication, for which they were primarily framed, I think no one will gainsay. But one must observe the federal system in operation as it unfolds itself day after day to realize that important as is this achievement they have done much more. They have infused a new spirit into judges and lawyers alike, and, together with other reforms which they have accompanied and helped to stimulate, chief of which is the Administrative Office of the United States Courts, have made efficient and effective law administration a working ideal for the federal lawyers.³ It is in the belief

1. Order of Jan. 5, 1942, 314 U. S. 716; 28 A.B.A.J. 91 (1942).

2. See the Advisory Committee's Preliminary Draft of May, 1936, 170, 171, with authorities cited; also the Report of April, 1937, vii; 3 Moore's Federal Practice 3453, 3454.

3. Much of this is not subject to quantitative assessment; so far as it is susceptible to law review analysis it is ably treated by J. W. Moore, *The Supreme Court: 1940, 1941 Terms—The Supreme Court and Judicial Administration*, 28 Va. L. Rev. 861-910 (1942).

FEDERAL RULES COMMITTEE

that they can have still more impressive effects and operate even more than they have yet done as models of simplified practice for state and federal systems alike that these proposals are made.

Function of the Committee as to the Present Rules

We may first consider what should be the function of a continuing active advisory committee as to the existing civil rules. Four immediate activities may be suggested: the correction of any mistakes of draftsmanship which may have crept into the rules; the clarification of policy as to rules which may have appeared as ambiguous, at least to some courts; the review in the light of experience of some of the choices of policy originally made; and the consideration of provisions to cover some matters outside the scope of the present rules. Of mistakes in draftsmanship, the wonder is that so few have been discovered. Perhaps I was too close to the making of the rules to be allowed extensive comment, but I think I may point to the lesser difficulties of their interpretation as compared to that of, say, the ordinary statute. There have been cases of mistakes; but considering the substantial extent of the task and the short time taken for its consummation, these seem relatively insignificant.⁴ The policy of submitting the rules for extensive criticism to the bench and bar bore fruit not merely in their ready acceptance by all as participants in a common enterprise, but also in the safeguards thus afforded against mistakes.

Moreover, the nature of the rules is such that doubts as to meaning are—except for policy choices discussed below—of little effect on their operation. Generally speaking, they confer power on the trial judges. Since they thus take nothing away, a judge may himself correct anything which works out improperly in practice. One should not be misled by the number of decisions upon the rules.⁵ That so many precedents seem available is due in part to the enterprise of law publishers, with their various editions of rules decisions, and in part to the desire of the judges themselves to participate in the new movement. Nevertheless, these decisions in the main reiterate the broad authority of the rules themselves, and are not really necessary for a correct interpretation of the new system.

Next, as to those rules which represent a choice of policy, we should distinguish between those where an actual choice was clearly made and those where the policy still seems to be in doubt. These latter cases, I expect, are the not unusual ones where lawyers cannot bring themselves to believe that the ancient customs,

to which they are so well accustomed, have really been abolished. It takes an everlasting no, and maybe two or three of them, permanently to exorcise sacred pleading rites, no matter how inhibiting they are. To take an example, which to me at least seems striking, I would mention the creeping back under the rules of the old qualms against the "speaking demurrer." There have been several district court decisions that motions to dismiss under Rule 12(b) are substantially common-law demurrers, and that hence it is improper to decide them in the light of other material in the record, such as affidavits of the parties, although, of course, this is the required course if only the motion can be christened anew as one for a summary judgment under Rule 56. This conclusion surprised me greatly, as not merely a glorification of nomenclature unusual for the rules and as contrary to specific provisions concerning the use of affidavits upon motions generally [Rules 6(d), 43(e)], but perhaps even more because it seemed directly opposed to the whole spirit of the new procedure which makes the formal pleadings unimportant as compared to adjudication on the merits. Such a view, if followed, would mean a decision on the mere form of the allegations, with rigorous exclusion of the merits, even if disclosed in the record.⁶ Of course, this sort of thing often corrects itself in time; the fact that all of the circuit courts of appeals that have passed upon the matter have decided the other way⁷ may indicate that in course of time the spirit of the new rules is bound to prevail. But is there not a better and a shorter way than this?

Adjudication by appellate courts is certainly not a direct way of settling mooted pleading points. Many of the issues concerning the rules, particularly those dealing with the important new provisions for deposition and discovery, almost never reach the appellate courts. I find considerable demand voiced both by district judges and by counsel that the circuit courts should take up more procedural questions in order to settle points of practice. I submit that this is not a really helpful or a desirable solution. Here we are dealing with matters of administration of the courts—that is, how to get court business done. A supervising committee continuously observing the practice with an eye to its betterment can do both a more informed and a more complete job than an appellate court reviewing separate cases for the one purpose of deciding whether justice has been done between the litigants actually before it. An appellate court can neither choose nor frame the issues which it must review. Nor can

4. Compare the word "rule" in the last line of Rule 4(e); 1 Moore's Federal Practice 341; *O'Brien v. Richtarsic*, 2 F.R.D. 42 (D.C.W.D.N.Y. 1941). Application of the civil rules to bankruptcy cases may at times present minor difficulties where the bankruptcy situation was not in mind when the civil rules were drafted, e.g., Rule 58 as to entry of judgment.

5. But compare *Sims*, *New Alabama Equity Rules*, 1 Ala. Lawy. 13 (1940).

6. This I have discussed in *Jud. Adm. Monograph*, Ser. A,

No. 18 (1942) 15-18, also in 27 Iowa L. Rev. 272, 283-288 (1942), and in the monograph, Ser. A, No. 5 (1941), on Summary Judgments, 8, 10; see, also, 9 Geo. Wash. L. Rev. 174 (1940). But cf. 30 Calif. L. Rev. 92 (1941).

7. To the cases from three circuits cited in my monograph on Simplified Pleading, note 6, above, may now be added, from another circuit, *Lucking v. Delano*, — F. (2d) —, 6 Fed. Rules Serv. 23b.3, Case 1 (C.C.A. 6th, June 6, 1942); and see, also, *Victory v. Manning*, 128 F. (2d) 415 (C.C.A. 3d, 1942); *Samara v. United States*, — F. (2d) — (C.A.A. 2d, July 6, 1942).

the various circuit courts seek agreement among themselves on points of practice; and such cases, as experience has shown, come even more rarely before the Supreme Court of the United States. In other words, the point is not really settled. This, then, is not a practicable or desirable solution; consideration by a standing committee is.

Committee Reports Will Make Frequent Amendments Unnecessary

I do not suggest that such a committee should be compelled to pass on every matter of detail in the procedure and offer a formal amendment to the rules for every decision of a trial judge which it thinks mistaken. That is not a necessary course, nor do I think it a likely or a probable one. The committee would naturally look to the broader trends of the procedural decisions. Its annual reports would bring out such trends and discuss them authoritatively. I expect that in most instances the committee would stop there, and would not find it necessary to propose a formal amendment. Those of us who had something to do with the framing of the rules originally can testify how often we are approached for information as to the background of specific provisions and for their correct interpretation. Our natural inclination is to help out as best we may, for we wish to do our part in making the rules function well and in helping the lawyers adjust themselves to the system. There is a real professional demand, which many of the cases reflect, for this type of discussion. And yet each one of us must think how dangerous our response must be because of its unofficial and curbstone nature. Thus, the yearly reports of the committee might prove to be more important than its suggestions of actual amendments. It would be an advantage that the Court itself would not be bound by such reports and would thus be free for adjudication of actual issues as they arose; while the discussions would have such force as the experience and considered judgment of the committee could command. Of course, where a real ambiguity had shown itself, the committee would then be in a position promptly to recommend some simple amendment to clarify the uncertain provision.

One mechanical difficulty has developed as to such a simple amendatory process. It seems to be the view

that amendment must be in accordance with the requirements of the second section of the Enabling Act of 1934, dealing with the union of law and equity. By this section, "such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."⁸ It has been the considered view of some of us that this has reference to the one change referred to in that section, a change historically of overwhelming importance, the union of law and equity, and that all lesser changes, once that union had been achieved, could follow a more normal and less cumbersome method.⁹ But the actual practice seems to be more or less settled otherwise.¹⁰ The vice of this is, of course, not in the reporting to Congress; it is in the cumbersome way in which it must be done. On the one amendment so far adopted, which was of the most simple and formal kind, nearly a year and a half was consumed from its proposal to its taking effect. For anything really requiring extensive consideration, about two years would seem a minimum, and careful planning would always be necessary to see that the consummation of the committee's and the Court's labors coincided with the opening of Congress. As we have seen, the world can become a shambles in considerably less time than that. Hardly any amendments, corrective or otherwise, are likely to survive that time element. A simple statute permitting the Court both to amend and to decide when the amendment becomes effective—with, if it is thought desirable, a provision for reporting amendments to the Congress¹¹—would easily obviate this difficulty.

Several Rules Which Should Be Restudied

Next the committee should review policy choices definitely made in adopting the rules, now that we have the light of the present accumulated experience of four years. Here opponents of tinkering, so-called, are likely in the long run to cause difficulty for court rule-making. For if all proposals for even restudy of the rules are to be frowned upon, eventually the jam must be broken by appeal once more to the legislature. I do not see, if committee and Court will not act, how any of us can say that those desiring change should not go to Congress. That is then necessarily the only course open to them. Of course, this is to be regretted, for it gives up all the

8. Act of June 19, 1934, c. 651, § 2, 48 Stat. 1064, 28 U.S.C.A. § 723c. The first section, *ibid.* § 723b, provides merely that "they [the rules] shall take effect six months after their promulgation."

9. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 Harv. L. Rev. 1303, 1309, 1310 (1936); also *United States v. Adler's Creamery*, 107 F. (2d) 987, 992 (C.C.A. 2d, 1939); 3 Moore's Federal Practice 3448-3452, and Supp. 231, 232.

10. By the course followed by the Court, on recommendation of the Advisory Committee, with reference to the one amendment to the rules so far adopted, that adding a provision to Rule 81 (a) (6), making the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act. The Court on November 6, 1939, asked the committee to prepare amendments; the committee met on December 7, 1939, and recommended the amendment which was approved by the Court on December 28, 1939, and presented

to Congress at the beginning of its regular session in January, 1940. Since Congress remained in session throughout that year and the amendment by its terms did not become effective until three months after the adjournment of Congress, it was the end of March, 1941, before this limited change took effect. 3 Moore's Federal Practice Supp. 217, 218.

11. Since Congress may act, with respect to the rules, at any time by formal statute, but in no other way (the Enabling Act itself does not provide for any act by Congress), it would seem unnecessary to provide for any formal action by Congress. Of course, a statute might require the Court to delay the taking effect of the rules for 30 days after they are reported to Congress; but in view of the already unlimited power which Congress has, it would seem desirable to avoid restrictive specifications, tying the Court's hand unnecessarily, in any legislation affecting the subject.

advantage of expert regulation of court procedure just at the time when it really becomes expert. But no process of sitting on the lid can last long in a democracy, particularly in a field where change has been so regular and, indeed, so necessary as in that of procedural reform.

Here again I shall content myself simply with examples of matters which the committee ought to restudy. One of the most important is as to the scope of deposition and discovery. In many ways this system in its entirety was new, even going beyond the English model. How well it actually functions is a matter for consideration and discussion. At the present time the New York Law Society and the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts have been conducting a study as to its practical operation, particularly with reference to the large number of cases which arise in the Southern District of New York. I do not know what this may show. Conceivably it may show such things as instances of excessive costs upon poor litigants as compared to the results achieved in clarifying the facts before trial. (I do not state this as a prophecy; I merely cite it as a possibility, for example's sake.) Suppose that is so, or suppose that other suggestions for modification of details of the discovery rules should be developed by this study. Where are such suggestions to be made to receive the consideration they deserve? Obviously the proposals of one group cannot have consideration if those of others do not. And obviously if the committee is to be passive, these suggestions must go to a committee of the Congress.

Another example is one which has much interested me and about which I have written, namely, the whole process of making objections to the mere pleadings—the sham battles of the law where form counts more than do the merits of a cause.¹² Federal Rule 12 was clearly a compromise between two views, the English view making preliminary hearings on objections generally unavailable except where the court anticipates a final adjudication on the merits as a consequence, and the typical American code or common-law view of extensive and successive hearings on these matters. Under Rule 12, the English system can optionally be put into effect by a strong-minded trial judge, but the rule itself suggests successive hearings on jurisdiction, venue, and process, on the form of allegation, and finally on the merits, plus extensive motions to make more definite, for bills of particulars, and so on—all in the best ancient tradition. The decisions show that that rule has caused more litigation than any other; I think we can add that the controversies it has caused and the little degree of success achieved under it before the trial courts indicate that this whole process is really quite antiquated and

at constant variance with the generalized system of pleading visualized by the rules. I believe it is time once more to re-examine the compromise which this rule represents and to consider whether a more thoroughgoing reform is not in line with the general objectives of the new procedure.¹³

Finally, in our consideration of the committee's function as to the rules themselves, we may turn to the entirely new rules which might well be found desirable. In the original rules the subjects of evidence, provisional remedies, condemnation proceedings, and receiverships were quite pointedly avoided by leaving them to that system the unsatisfactory character of which was the original reason for the reform, namely, that of state conformity. Already there has been vigorous criticism of the difficulties of the evidence rule, and scholarly demand for its extensive revision.¹⁴ And a tentative draft of uniform rules with reference to condemnation proceedings has been suggested by the Department of Justice. I think we can expect more, rather than less, of such proposals in the future.

Of those which I have mentioned all deal with matters already within the field of our general knowledge. But ideas for reform of civil procedure will not stop with matters which are presently within our cognizance. The whole history of procedural reform has demonstrated the continual development of new ideas as the old practice gets more and more encrusted with red tape. Of course, it is the tendency of procedure, as it is of all things which must be done recurrently and with fairness to all involved, to follow settled rules and with ever increasing rigidity as time goes on.¹⁵ Red tape is an essential of courts as well as of government bureaus. We must, however, have some way of preventing red tape from stopping all activity. Hence there is necessary some means by which consideration can be given to all new ideas, even those we ourselves have not yet thought of, and by which experimentation testing their worth can be developed. That is but another way of saying that federal procedure should remain where it now is, in the forefront of procedural progress, and that it should not be permitted to slip to the rear on the theory that the job has been done once and for all. And that I conceive of as a vitally important task for an active rules committee.

Cooperation with Other State and Federal Agencies for Improving the Administration of Justice

Passing now beyond the horizon of the rules themselves, I look to a much wider scope for committee activity than merely the technical aspects so far touched upon, important as they are. A continually functioning body, with duties more than merely legislative in

12. I have discussed this rule in some detail in the monograph on Simplified Pleading, note 6, above.

13. A revised rule is suggested in the monograph on Simplified Pleading, note 6, above.

14. Green, *The Admissibility of Evidence under the Federal Rules*, 55 Harv. L. Rev. 197-225 (1941); and see, also, 1 Wigmore,

Evidence (3d ed. 1940) §§ 6c, 6d. As to the improbability of satisfactory reform of the law of evidence by legislation, see Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 933 (1937).

15. See Simplified Pleading, note 6, above, at p. 9; Hepburn, *The Historical Development of Code Pleading* (1897) 31, 37; Clark, 9 Conn. Bar J. 290 (1935).

devising and amending procedural rules, but also administrative in supervising and making effective court conduct of litigation, would then constitute a group to which state procedure-making authorities could turn for suggestion, criticism, and cooperation. At the present time there is no such opportunity; and, in fact, state organizations are not profiting as much as they might from the aid which the federal experience should supply. I would not be unduly pessimistic, but it is my conclusion that the federal reform, notwithstanding all its outstanding success, is making less of a dent on state procedure than it should. I know, from questions addressed to me as to the operation of specific rules by state procedure authorities, that if there were an authoritative body able to quiet some doubts and worries about these rules a great deal could be accomplished. Likewise improvement in federal procedure would result from the criticisms and suggestions of state authorities. True, there has been a wholesome and seething ferment for procedural reform, to which Judge Parker's Special Committee on Improving the Administration of Justice has been a stimulus and an inspiration. If, however, we look at the results we must admit that the states, except with respect to a few special topics, such as joinder of actions, have pretty much gone their own gait.¹⁶ Unless we suggest some unifying means, we shall have just as many systems of new reformed procedure as we had in the past of old inflexible practice.

Not only is this true as to the effect of the federal reform on state systems; it is also true as to its effect on other federal systems. Federal civil procedure has not really sold itself in all parts of the federal system. In view of the popularity of the federal rules, it seems amazing to find the annual meeting of the Maritime Law Association of the United States voting, with but a single vote in opposition, as the sense of the meeting, "that the Rules of Civil Procedure should not be extended to admiralty practice any further than they have been already."¹⁷ Perhaps one can find the explanation of this surprising result in the fact that the admiralty lawyers were opposed to one or two special rules of civil procedure, which they considered inimical to their best practice, and hence they took this method of opposing all change as perhaps the lesser evil.¹⁸ But an informed and actively functioning committee, to whom the admiralty lawyers could present their problems in person or by representatives, would surely tend to allay this feeling. At least it would be possible to effect an agreement upon the large areas of reform as to which

there certainly cannot be objection on the part of the admiralty bar. A leaderless federal procedure will result, however, in admiralty practice unassimilated to ordinary civil procedure except insofar as the judges do it by main strength, so to speak, in their adjudicated cases.¹⁹

The position of a continuously functioning committee in its proper setting in relation to other instrumentalities of judicial administration is, I think, a matter for future consideration once the activities of the committee are settled. I suggest this as a most promising subject, without attempting to develop it in detail.²⁰ One can see how easily and naturally such a committee would operate with the Administrative Office of the United States Courts and with the Conference of Senior Circuit Judges, both now active forces in federal judicial administration. If the proposed new rules of criminal procedure are recommended and go into effect shortly, then that committee could also continue to function along lines here indicated, or perhaps a combined rules committee might serve for both procedures. In other words, the administrative foundation for such committee activity is already provided. It would be a comparatively simple matter to fit such continuing committee or committees into the framework thus so well provided.

The Resolution of the Committee on Jurisprudence and Law Reform

For these reasons I have been happy, indeed, to read the Report of the Association's Standing Committee on Jurisprudence and Law Reform, which sets forth succinctly and briefly the main reasons for an actively functioning advisory committee on rules of civil procedure.²¹ I recommend the reading of that report to all members of the Association, and I also urge full support for the resolution which that committee has proposed as follows:

"Resolved, that the continuing Advisory Committee on Rules of Civil Procedure for the District Courts of the United States, created by Supreme Court Order of January 5, 1942, should periodically survey the functioning of the Federal Rules; to that end should invite suggestions and criticism from the American bench and bar, meet at least annually to consider the functioning of the Federal Rules and to determine whether amendments are desirable, and make a formal report to the Court at the opening of each term of the Court (or at such other time as the Court may direct) of the result of its survey, together with amendments, if any, recommended by it."

16. Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 Tex. L. Rev. 4 (1941); *Dissatisfaction with Piecemeal Reform*, 24 J. Am. Jud. Soc. 121 (1940); and *Simplified Pleading in Connecticut*, 16 Conn. Bar J. 83 (1942).

17. Doc. No. 272, Maritime Law Ass'n of the U. S., Special Meeting Jan. 16, 1942, p. 2818. An earlier ballot by mail had yielded a vote of 110 to 73 for this same result. The meeting had already voted, with only one dissenting vote, against doing away with new trial on admiralty appeals and for revision of the rule as to findings, and also by vote of 29 to 23 that the pre-trial practice as set out in the Civil Rules should be adopted into admiralty. *Ibid.* 2816-2818.

18. Compare the votes as to trial de novo and findings referred to in note 17, above. But that the civil rule as to the effect of findings already obtains in admiralty, see the cases reviewed by L. Hand, J., in *Peterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F. (2d) 992 (C.C.A. 2d, 1942).

19. See *Boston Ins. Co. v. City of New York*, — F. (2d) — (C.C.A. 2d, July 8, 1942); *Peterson Lighterage & Towing Corp. v. New York Central R. Co.*, note 18, above.

20. Professor Moore calls attention to these possibilities in his article, note 3, above.

21. See, also, Moore, note 3, above, at pp. 899-907.

CONSTITUTIONAL PROBLEMS IN THE COMING WORLD FEDERATION

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EVER since the address of Under-Secretary Welles on May 30 last, at Arlington, it seems entirely certain that, after a peace settlement is reached, the next phase will be an international conference to establish some sort of a World Federation, in which the United States will play some sort of a part. What will be the constitutional problems that must inevitably be faced in the formation of such a federation (or association or union)?

It is not too early for members of our profession to begin formulating their views (provided meantime we do not relax one jot of our war-winning effort); for it is a trite saying that though we win a good war we may lose a good peace, and a good peace requires thorough prior planning.

There are plenty of the expected problems under discussion that do not concern lawyers (except as citizens). Most of them involve proposed economic and social policies. But there are also problems of *Constitutional Law*, and for adequate preparation in solving this type of problems the nation will look to our legal profession for expert guidance. I wish here to call attention to them, and to invite our profession to give to them its early and active thought. If we do this, we shall evolve, before the crucial moments of an international conference arrive, a definite trend of professional opinion which will serve to guide the votes of the United States delegates to the Conference, and to shape the attitude (later) of the Congress in acting upon the Conference proposals.

These constitutional problems, be it noted, are of much the same type as those that faced the delegates to the Constitutional Convention of 1787 at Philadelphia. They also had to be faced in several of the modern multipartite international associations of limited scope — (to name only a few) the Universal Postal Union of 1874, the International Copyright Union of 1878, the International Industrial Property Union of 1883, the Central American Union of 1921, the Pan-American Union of 1889, the League of Nations, and the International Labor Organization. They have to be faced by any sort of international association and decided one way or the other; only this time they will be of larger scope and momentous consequence.

1. The only three books, hitherto, that treat the entire subject practically, in the style of constitutional lawyers, appear to be the following: Raleigh C. Minor, *A Republic of Nations* (New York, Oxford U. Press, 1918); Oscar Newfang, *The United States of the World: a Comparison between the United States of America and the League of Nations* (New York, Putnams, 1930). The third book also covers the entire subject, though in the style of a political scientist rather than of a constitutional lawyer, but with the special merit of submitting also the text of a proposed constitution: Clarence K. Streit, *Union Now* (New York, Harpers, 1938).

They may be grouped under five general headings:

- I. The Basis of Representation of States;
- II. The Rule for Decision (Unanimity or Majority);
- III. The Scope of Legislative Powers;
- IV. The Executive Power to enforce Compliance, and
- V. Citizenship.

Each of these headings covers a number of inevitable details.¹

With a view to stimulating and assisting the formation of convictions on these various details, I offer the following analysis of the problems. Under each of the five broad headings is added a list of recent books and articles dealing with one or more of the details of the problems. These citations are limited to discussions of the distinctively legal aspects of the subject—not the economic or the social aspects. I want to see the lawyers start thinking and making up their minds; so that, when the proper time comes, their special experience and judgment on these problems, already familiar to them in our own constitutional field, will have been formulated and can readily be invoked for the international solutions.

Here are the five groups of problems:

I. THE BASIS OF REPRESENTATION OF STATES IN A WORLD FEDERATION.

(a) *What States* should be eligible—all? or some only? And if some only, what particular class? Should eligibility be based on the State having a particular form of domestic government? Or on its status in the Second World War?

(b) On what *unit basis of representation* should the number of each State's delegates be allotted? Should the Congress be unicameral or bi-cameral? If bi-cameral, on what relative basis of power? Should it have an executive committee in permanent session?

(c) What *kinds of persons* should be the delegates? Should they include holders of office in the national Legislatures? How selected—by appointment of the national Executive, or by election by the national Legislature, or by national popular vote? If by such vote, how should they be nominated?

(d) How long should be their term of office? How should expenses be allotted among the member-States?

(A.J.I.L. = American Journal of International Law)
Baldwin, *Representation in International Unions* (A.J.I.L. 1919, XIII, 45)

North Carolina, General Assembly Resolution of March 13, 1941, Declaration of the Federation of the World
Myers, *Representation in Public International Organs* (A.J.I.L. 1914, VIII, 81); the same: *The Basis of International Relations* (A.J.I.L. 1937, XXXI, 431)

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Hicks, *The Equality of States* (A.J.I.L. 1908, II, 530)
 Sayre, *Experiments in International Administration* (New York, Harpers, 1919)

Hudson, *Progress in International Organization* (Stanford U. Press, 1932)

Eagleton, *International Government* (Ronald, N.Y. 1932), §§ 3-5, 57-68, 92-97

Commission to Study the Organization of Peace, Preliminary Report (International Conciliation, No. 369, April, 1941)

Eagleton, *Organization of the Community of Nations* (A.J.I.L. 1942, XXXVI, 229)

Vinacke, *International Organization* (New York, Crofts, 1934)

Peaslee, *International Constitutional Law* (27 A.B.A.J. 358)

Pepper, *The Lawyer's Approach to Post-War Problems* (27 A.B.A.J. 733)

Jennings, *A Federation for Western Europe* (Cambridge, Eng., University Press, 1940)

Brecht, *European Federation: the Democratic Alternative* (Harvard L. Rev. 1942, LV, 561)

Newfang, *United States of the World*, chaps. V, VI

Minor, *Republic of Nations*, Introd. and chap. IV

Streit, *Union Now*, chaps. V, VII, and Annex I

II. RULE OF DECISION.

(a) What should be the rule for decisions—*unanimity*, or majority? And what sort of majority?

(b) Are decisions to be *effective per se*, by vote of the Congress, or is ratification by the national Governments needed for each measure? If for some measures only, for what ones? If ratification is required, by what number of States, to be effective? How determine the date of effectiveness?

(c) Are dissenting States bound? May a State make reservations? Or resign?

Eagleton (cited *supra*) § 72

Hill, *Unanimous Consent in International Organizations* (A.J.I.L. 1928, XXII, 319)

Williams, *The League of Nations and Unanimity* (A.J.I.L. 1925, XIX, 475)

Stone, *The Rule of Unanimity* (British Year Book of International Law; 1933)

Riches, *The Unanimity Rule and the League of Nations* (Baltimore, 1938, Johns Hopkins U. Press)

Myers, *Voting Methods in the League of Nations* (A.J.I.L. 1926, XX, 688, at 702)

Brecht, *European Federation* (cited *supra*, par. I)

Newfang, *United States of the World*, chaps. IV, X, XIII

Minor, *Republic of Nations*, chap. V

Streit, *Union Now*, chap. VII, and Annex I

III. SCOPE OF LEGISLATIVE POWERS.

(a) What should be the scope of legislative powers, as to subjects? Matters affecting world-peace? Or general welfare? Or only specific subjects already covered by multipartite treaties, such as postal service, patents, trademarks and copyrights, radio communication, air navigation, public health, etc., etc.? Or also on new specific subjects, such as coinage?

(b) Should the reserved powers of the individual States be expressly defined? Should some States be allowed to claim other reserved powers special to themselves and not uniform with the others? How should the boundaries be determined, in case of dispute or doubt, between granted and reserved powers? Could

legislative action be subdivided regionally, so as to be effective only for a regional group of States? Should the individual States continue to have power to make special treaties among themselves on subjects covered by the granted federal powers?

Eagleton (cited *supra*), §§ 73, 74

Johnston, *Parliaments, National and International* (chap. III in Problems of Peace, Fifth Series, London, 1931)

Keeton and Schwarzenberger, *Making International Law Work*, p. 210 (New Commonwealth Institute Monographs, Series A, No. 5; London, 1939)

Brecht, *European Federation* (cited *supra*)

Hill, *International Administration* (New York, McGraw-Hill, 1931)

Newfang, *United States of the World*, chaps. V, VI

Minor, *Republic of Nations*, chaps. V-XIII

Streit, *Union Now*, chaps. VII, VIII, X, and Annex I

IV. EXERCISE OF EXECUTIVE POWER.

(a) By what mode of compulsion ("sanction") could compliance be enforced from a recalcitrant State? By expulsion or suspension? By an international police force? If yes, how composed? Or by an international boycott? If yes, how effected? Should disarmament of individual States be planned?

(b) How is non-compliance to be determined? Who is to make the order for enforcement—the Congress, by a called special session if necessary? And who is to call it? Or by a delegated Central Committee, sitting ad interim? Should a hearing be held, before issuance of such an order?

(c) If the recalcitrant State persists, and a war ensues, do all the member-States become parties to the war?

Eagleton (cited *supra*), §§ 16-20

Jackson (Mr. Justice), *The Challenge of International Lawlessness* (27 A.B.A.J. 690)

Knox (Secretary of War), *The Challenge to Government by Law* (ibid. 711)

Webberg, *Theory and Practice of International Policing* (London, 1935)

Hart, *An International Force* (International Affairs, XII, 1933)

Arnold-Forster, *Order and Self-Defence in the World Community* (chap. XI in Problems of Peace, cited *supra*)

Madariaga, *The Difficulty of Disarming* (chap. XIII in Problems of Peace, cited *supra*)

Williams, *Sanctions under the Covenant* (British Yearbook Int'l L. 1936, p. 130)

Brecht, *European Federation* (cited *supra*)

Spencer, *The Organization of International Force* (A.J.I.L. 1915, IX, 45)

Thomas, *An International Police Force* (London, 1936)

David Davies, *The Problem of the XXth Century* (London, 1930; elaborately considering the problem of an international police force); the same: *Force* (London, Constable, 1935)

Van Vollenhoven, *War Obviated by an International Police* (The Hague, 1915)

Ralston, *A Quest for International Order* (Washington, Byrne, 1941)

Carr, *The Twenty Years' Crisis 1919-1939* (New York, Macmillan, 1939)

Wild, *Treaty Sanctions* (A.J.I.L. 1932, XXVI, 488)

Wright, *Sanctions against Aggression* (A.J.I.L. 1925, XIX, 76, at 96)

Dean, *The Struggle for World Order* (Foreign Policy Assn., New York, 1941)

REDUCING THE VOLUME OF PUBLISHED OPINIONS

Sundry Authors, *War Obviated by an International Police* (The Hague, Nyhoff 1915; reviewed by Pres. Chas. W. Eliot in A.J.I.L. 1915, IX, 760)

Nicholas Doman, *The Coming Age of World Control*, chap. 7, "The Organization of Force in the World Order" (New York, Harpers, 1942)

Newfang, *United States of the World*, chaps. VIII, IX

Minor, *Republic of Nations*, chap. XVIII

Streit, *Union Now*, chap. VII, and Annex I

V. CITIZENSHIP.

(a) Shall the new Association (or Federation) preserve the orthodox principle of international law that *only member States* (or other units) are recognized as having legal relations with the Association? If so, shall provision be made for suits between States? And shall a so-called Bill of Rights be framed, defining the limitations of conduct which each member-State is bound not to transgress as against the others?

(b) Or, also, shall some recognition be given to the *individual natural person* as a citizen also of the Association (or Federation)? If so, shall provision be made for suits by citizens, in the Federal court, against each other, or against States? And if so, shall a so-called Bill of Rights be framed, defining the protection to which the individual citizen is entitled, either against his own State or against other States?

Minor, chap. IX-XIV

Newfang, chap. V, VI

Streit, chap. VII-X

World's Citizens' Assn., Quincy Wright, Secy. (84 East Randolph St., Chicago), "The World's Destiny and the United States," 1941, chap. III, and App. II, "World Citizenship."

American Law Institute, Proceedings, May 1942, *An International Bill of Rights*

Let us now all proceed to think these questions through, so as to be ready with considered views.

THE PROBLEM OF REDUCING THE VOLUME OF PUBLISHED OPINIONS*

By HON. JOHN D. MARTIN

United States Circuit Court of Appeals, Sixth Circuit

FROM college days, I recall a professor of higher mathematics who had the knack of so complicating a problem that his class would sit in bewildered wonderment whether the professor himself could disentangle it. At the pinnacle of his students' despair, the professor would crisply announce: "Now, the problem is easy. Eliminate Theta and solve for X." I think I shall adopt his method. It is the easiest way to present the perplexing problem of the ways and means by which the volume of published judicial opinions may be reduced.

It cannot be denied that a problem exists. The voice of the American Bar is vigorously asserting that it does. In current law journals and periodicals, and in speeches at bar meetings, lawyers are admonishing judges that the problem has become acute. The lawyers are praying for general relief from the ever increasing landslide of published opinions.

It must be conceded that no lawyer can possibly read—even sketchily, and with the aid of daylight savings' time—the mass of published opinions of courts and administrative tribunals, the acts of Congress and those of state legislatures, and the myriad decisions, orders, promulgations, rules and regulations of government administrators with which a well-rounded practitioner must be conversant.

In an era in which case system jurisprudence has conquered all foes, there yet remain attorneys and counselors at law, whose scholarly ambition would defend the blush of shame at the mention of some important court pronouncement with which their utter unfamiliarity could be casually betrayed. If the ratio of present judicial output of published opinions is maintained, these lusty men of the law will be forced to abandon their worthy struggle for academic knowledge of current case law.

Diligent study will not enable a *pragmatic* practitioner to keep abreast of the day-to-day opinions authoritative in his field of work. The avalanche of opinions from the judicial mountainside has rolled down with such momentum that he, too, has been buried alive. I plead guilty personally to having given the avalanche more than a gentle push.

Hypothetical Calculations

During the present term, I have written for publication twenty-one opinions for our court, and shall probably be assigned five more. Should I be, my total published opinions for a period of one year would aggregate twenty-six. As listed in 123 Federal Second Reporter, fifty-seven United States Circuit Judges are in active commission. There are five judges of the Court of Customs and Patent Appeals whose opinions are published in the same reports containing the opinions of

*Address before the Judicial Conference of the Sixth Judicial Circuit at Cincinnati, May 8, 1942.

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the Circuit Courts of Appeals. If my personal opinion-factory production is equal to the general average, 1,612 opinions will be published in Federal Second as the gross production for one year. Conservatively estimating that each of the forty-eight highest state courts has an average membership of six judges, and that each judge writes twenty-six opinions per year, 7,488 opinions would be published annually by the highest state courts.

Upon my hypothetical calculations, the opinions published in Federal Second added to those of the highest state courts would reach the prolific total of 9,100 per year—or, the staggering number of 91,000 opinions in a decade. Some adventurous soul might say that this is 61,000 opinions too many.

Be it remembered, moreover, that the opinions of the state intermediate appellate courts have been omitted from calculation; not because they are unimportant (See *West v. American Telephone and Telegraph Company*), but because I am not in possession of sufficient data from which to make calculation. It is, of course, well known that the opinions of most of these state courts are published in bound lawbooks, and add to the burden upon both the purse and the time of the lawyer.

Many of you would be more capable of estimating the average number of opinions published by district judges in Federal Supplement than I would be. My own average as a district judge was around seven such opinions a year. If this figure is adopted as a criterion, the 178 district judges in active commission plus the five judges of the Court of Claims would contribute 1,281 opinions to Federal Supplement annually. Federal Supplements sell for the same price as Federal Reporters. They are generally regarded as worth more! But the lawyers probably think that neither of the books is a bargain.

My individual view is that the lawyers' prayer for general relief from the continued accumulation of published opinions should not be denied. Both state and federal judges are vested with the power to grant relief; but, in a conference of federal judges, the problem of ways and means of accomplishing curtailment would well be delimited within the confines of their own jurisdiction. So, I shall speak within such delimitation.

United States district judges have the means with which to make the first contribution. Succinct conclusions of law with adequate citation of authority usually reveal the rationale of decision as distinctly as would a labored opinion. Every present or former district judge is well aware that the pressure of keeping current with the trial of cases leaves little time for careful opinion writing. His good judgment convinces him that it is more important to try cases promptly than it is to postpone trials for the purpose of writing erudite opinions. But, now and then, an excellent opportunity is presented for a district court opinion of far-reaching effect.

The district court is the firing-line court. In action, the district judge must often shoot from the hip. Should he, once in a blue moon, miss the mark, which a more

deliberate aim would have hit, he has at least not lost the battle of promptitude in decision. Next to just decision of cases, timeliness of judgment is the most important consideration in the practical administration of justice. Within my own observation, more miscarriages of justice have resulted from delayed decision than from insufficient deliberation. The average lawsuit does not become easier to decide correctly by too much mulling over it.

United States Circuit Courts of Appeals

In reviewing tribunals, more deliberate processes of study are essentially expected and required. But, even so, cumulative opinions should not be exacted as proof of deliberation. The court of appeals for this circuit has, by frequent affirmance on order, already contributed in some measure to reduction of the number of appellate court opinions. It should be known, however, that the order has been entered only after the record, briefs and authorities have been examined with the same particularity as if an elaborate opinion had been the resultant.

Last year, in a controversy between a jabbering inventor and a fast-talking salesman, the wise and witty senior among the district judges of the Sixth Circuit delivered an oral opinion so graphic in descriptive power that we could almost hear the chattering contestants trying to outtalk each other. Any opinion of affirmance written by us would have fallen flat.

At the February session, we were confronted with a formidable looking six-volume record in an appeal from the just and able chairman of the program committee. Painstaking study of the entire record, briefs and cited authorities resulted in the unanimous conviction of our court that His Honor had so accurately analyzed the complicated issues that no opinion was necessary. The decree was affirmed on per curiam order.

The two instances mentioned are merely illustrative of the excellent work of all the district judges in this circuit in making possible the omission of formal opinions in numerous appealed cases.

The judges of the United States Circuit Courts of Appeals with a common will could readily find ways to reduce the volume of published opinions. The way of one judge might cross the path of another, but after a crossroads conference, the judges, each on a slightly deviated course, would doubtless be seen traveling together to the common objective.

The first signpost on the highway to opinion reduction points to a simple order of affirmance, without opinion, in a case in which the findings of fact are based upon substantial evidence and the conclusions of law are correctly drawn and clearly stated, whether or not the district judge has filed a written opinion. The rare exception to total abstinence from affirming opinions might well be cases of genuine first impression, presenting *real* rather than *pseudo* novelty. Some thoughtful skeptics still string along with Solomon,

despite the modern judicial trend toward discovery of something new in jurisprudence every time the sun rises on a justiciable controversy. An old principal in a new dress is still the same old schoolteacher. An old legal principle retains its antiquity, whether dressed in a trousseau of words or in a bareback rider's costume.

A great salvage of printer's ink and white paper would result from abstention from long fact opinions directing enforcement of the orders of the National Labor Relations Board and other administrative agencies. The reports already have been burdened with too many voluminous discussions reviewing findings of fact, conclusions of law, decisions and orders of the labor board. Rarely is a case now presented in which the writing of a fact review, followed by restatement of pronouncements of the Supreme Court, could flash new light upon a well-illuminated subject. Our most limited power of review has been repeatedly emphasized by the highest tribunal.

Tax Litigation

Tax litigation constituted approximately twenty percent of our case load during the current term. The majority of these tax cases reach us on petitions for review of decisions of the Board of Tax Appeals, which, in all but name, is essentially a court. The members of the board are experts in their field. Their opinions are generally concise, but sufficiently comprehensive. They are published and, therefore, accessible. When the court of appeals agrees with the reasoning and conclusions of the board, an order of affirmance is the order of the day. In practice, our court has entered many such orders. I think the percentage could be increased. When the Board of Tax Appeals is reversed, an opinion is generally indicated in view of the technical nature of the subject-matter.

The number of published opinions could be decreased if federal judges would refrain from writing them in diversity of citizenship cases involving only the pronouncement and application of settled local law. The function of federal judges in such cases has been reduced to the role of mere annotators of state law, which they cannot authoritatively declare. But, in this type of case, an opinion may not always be avoided. In order to make clear the *ratio decidendi*, it is often necessary to write a full opinion. The decisions must be reviewed, in order to reveal that there is no controlling state authority. Then must follow a discussion of the applicable law.

An advocate of opinion crop reduction in cases where judgments below are reversed plows more controversial ground. The prevailing view seems to be that opinions should be written in nearly all such cases. Personally, I favor no rule of thumb. It is true that where a reviewing court disagrees with a trial court upon determinative issues of law, the exposition of the divergent view is more frequently necessitated than is explication where the two tribunals are in accord. But, if the ground for reversal can be made crystal clear by a mere order, why

write an opinion? Certainly not because district judges are supersensitive. Temperamentally, district judges are, in my observation, broad-minded, case-hardened, forthright men, who would never attribute reversal of their judgments and decrees by orders rather than by opinions to any discourtesy or lack of respect from brethren as liable to human error as themselves—as the Supreme Court frequently attests.

When a case is reversed upon the facts, what contribution to the sum total of jurisprudence is made by lengthy factual discussion in published opinion form? A purely fact opinion, resolving no conflict of law, is of no practical or authoritative importance in the adjudication of other fact cases. Comparison of the facts of one case with the facts of other cases is much like comparing fingerprints under the Bertillon system. Always, there are distinguishing whorls, or other differentiating marks.

Judges well know that eyestrain to perceive resemblances often beclouds vision for essential differences, and therefore search for differences, which are invariably found. Lawyers long ago learned that decisions are not gained on the facts of *other* cases; and that he who is cast in his suit is thrown either by the weight of evidence adduced by his adversary, or by the light weight of his own.

The mere statement in a court order that the reviewing court finds insufficient substantial evidence to support the findings of fact upon which the trial court rested judgment should be as elucidating to the parties, the lawyers and the trial judge—already familiar with the facts—as would be a lengthy discussion. Every experienced trier of fact knows that there is no logistic open sesame to absolute certainty in drawing inferences from circumstantial evidence. When, after mature deliberation, two men differ in their inferences, rhetoric in all its forms will never convince either that the other is right. What to one judge seems substantial evidence may to another appear flimsy; and that's the Alpha and Omega of it. It may be safely assumed that, in every instance where the letters of the alphabet have been sparingly used in a reversal upon the facts, the reviewing court has, nevertheless, carefully read and considered the record before reaching final disagreement with the inferences drawn by the district judge.

Should published opinions be cut to one-third of the current number, there would remain abundant opportunity for wide-spread judicial pronouncement. An ever evolving fresh stream of ideas enacted into the law of the land constantly requires of the courts exercise of the interpretative function. Today, construction of statutory law exacts of the judge keener analytical power, more profound knowledge and deeper understanding than is demanded in the application of the principles of the common law. To construe a new statute or a binding regulation, the jurist must have care that mere freshness in words is not deceptive of oldness of origin. For interpretation of its true meaning, a new law must

be studied in its historical setting. Scholarly research is the first chore of the judge; clear convincing expression is his last task. Though a layman once said that words are used only to conceal thought, words, to the judge, are the stones with which he builds the structure of his opinion. A great opinion, like a great cathedral, is not built by a hasty throwing in of stones. Time is of the essence in good opinion writing. Its conservation by resistance of the urge to write an opinion in every case is the price which the judge must pay for his best possible product.

Far more important than worthwhile opinion writing by an appellate court judge is full consideration by him of the facts and the law of all cases in which he sits. Because he is not designated as the opinion writer in a particular case in no whit lessens his responsibility for correct decision. It is only frank to say that, if too many opinions are assigned to each individual member of a court of appeals, the inevitable result will be that insufficient consideration can be given by the judge to those cases in which he is not selected to write an opinion. He will, of course, work by night as well as by day in his conscientious effort to perform his duty. But, again, time is of the essence; and lack of time is an insurmountable limitation upon all human endeavor.

Reduction in the number of opinions reported in the case books is not the only method for avoidance of a surplusage of judicial utterance in print. A trend to shorter opinions would be an efficient adjunct; and massive thought may be often revealed in a few choice words. Many experienced opinion writers have asserted that a short opinion is harder to write than a long one. I concur. Certainly, the process of writing the shorter opinion requires closer concentration, choicer diction, better organized thought, and more toil and sweat—if not blood and tears.

The short opinion would seem to be the better vehicle for conveying jurisprudence to farther distances. Short opinions are more easily and generally read than are the longer ones. The affection of the American people for short movie newsreels, crisp radio broadcasts, pictorial essays, novelettes and tabloid newspapers, weekly condensed news magazines and readers' digests, certifies a universal demand for *brevity* in a swift-moving age. This jerky intellectual trend may be a deadly virus, but even so it has infected our countrymen, including some lawyers and judges. I, for one, have received my shot. I do not infer that judges should become journalistic in style; but I do mean that there is no answer to boredom. Reading, as well as writing, a long opinion may sometimes bore even a judge.

Despite my belief that we should strive earnestly to curtail production of published opinions, no advocate for economy of words could ever convert me to the view that a lawsuit should be decided without clear revelation of the grounds of decision. If the manufacture of more tomes of law be the appropriate means to the end of preserving individual freedom of judicial expression, I say bring on new chapels of printers. Let there be no unsolved mysteries in the courts. Reasons for the decision of cases should be always unmistakably clear. And each judge to his own style; for, as has been well said, in writing, style is the *man*.

Nor would I advocate arbitrary limitation in any form upon the writing or publication of opinions, or upon their length. May American judges ever remain free and untrammelled in the promulgation of their individual views. Destroy their freedom of expression in published reports and you destroy their medium of effective protest against infringement of the lawful and constitutional rights of a free people.

WHAT CHANGES IN FEDERAL LEGISLATION AND ADMINISTRATION ARE DESIRABLE IN THE FIELD OF LABOR RELATIONS LAW*

By HOWARD G. FULLER

Of the Fargo, North Dakota Bar

AS greater stability of government and enduring equity between men is the aim of our criticism of national labor relations law, mere details of imperfection and inequality are disregarded. It is believed that only simple changes of fundamental significance now are desirable. If those changes were now made the mellowing influence of time on individual attitudes eventually would bring about improvements of less importance.

*Another of the 1942 Ross Essays.

Reference here will be made only to changes believed necessary (a) to the maintenance of a democratic form of government and (b) necessary to the preservation of the object which brought this legislation into being, i. e., the *legal recognition of the collective right of wage-earners to economic well-being in equality with other groups and individuals*.

National legislation in the field of labor relations law is a result of the dynamic impact of a world-wide movement on government; a convulsion of civilization orig-

inating in the growing economic maladjustments of half a century. Historical retrospection is necessary to understand the significance of this movement in the United States; to give point to our thesis.

Through the decline of feudalism to the birth of our democracy, one may trace the emergence of the less fortunate of men from class and governmental subjugation. Eventually by revolutionary means their determination was written into our Declaration of Independence and the Constitution. The determination was that the law must recognize, and preserve from interference by government, the fullest measure of civil right in the individual citizen. For more than a century this right of the individual was expressed in expanding private enterprise and the accumulation of profit and property until it reached the ultimate in modern private capitalism. We refer to huge units of industry, transportation, commerce and finance combined in one gigantic institution of economy largely controlled by a comparatively small number of men. This institution in its very being was a powerful influence on law and administration of law. In its functions it was the employer of workmen in great numbers. Private capitalism as an economic order was built into government, protected and fostered by the law of individual right which had been made good by the Revolution.

Because of the employment of wage-earners in increasing numbers the growth of the institution of private capitalism, as we have defined it, stemming from individual rights, inevitably was accompanied by the assertion and the accentuation of a collective attitude of opposite interest. One result was the organization of labor unions as instruments for the expression of collective interest; for the attainment of betterment for the group.

The unions were unable to accomplish directly the reforms they sought by legislation. They lacked political ability to select or direct the makers of law, whereas the nature of their collective demands was incompatible with the legal rights of the individual, enforced by the courts. Accordingly they addressed themselves to management and supported their demands by use of the strike.

To make itself effective the strike often became the assertion of physical force, violence, intimidation and coercion. However frequently we find expression of the employees' inviolability of legal right to strike or maintain a peaceful picket, it is material to the sense of this writing that we look through fiction to the fact. At any rate this essay gives attention only to the strike that is manifested by a blockade accomplished by physical force and violence. Its object is physical coercion; to threaten injury to property and injury to persons attempting interference with the effectiveness of the strike. When necessary its threat is made good by

a demonstration of violence and brutality. The mere presence of its pickets at the factory gates often is effectively potentialized by shocking memories they invoke.¹

Prior to the social and economic reforms of the 1930's our law, as we have noted, gave supremacy to the legal right of the individual citizen. The ordinary strike in one way or another, whatever its purpose, amounted to a violation of that right. National courts, obedient to this sense of the law, freely granted the remedy of injunction against violence and physical intimidation; injury to persons and property.

As the repeated use of the injunctive arm of the national courts accentuated the inability of labor to obtain obedience to its demands by use of the strike, its movement turned more definitely toward two objectives: first, to more vigorous organization of unions on a national scale and, second, an appeal to congress for a legislative curb on the national court's jurisdiction to issue injunctions.

Both these efforts succeeded. Union membership was greatly expanded. And in 1932 Congress passed the Norris-LaGuardia Act.² The least that may be said of the effect of this act is that in labor disputes in the national courts, it renders practically useless the remedy of injunction.

These gains of the labor movement proved that, having overcome the obstructing forms and methods of the courts, labor now could assert itself in physical demonstration, action or inaction, more effectively on management and public opinion. But the economic and collective demands of the group still remained a contradiction of the legal right of the individual worker to accept and retain employment without joining the union, to join any union of his choice, to bargain individually with his employer and work without interference when he chose to work. Management rightly could foster unions of its preference and discredit others. The legally rightful alliance of management with non-union and company-union workers impaired the total assertion of labor's physical weapon, the strike. Personal, property and contract rights of individuals still were unclipped in public, legislative and judicial estimation.

Following the enactment of the Norris-LaGuardia Act we reach a period when the growing necessity of collective group interest loudly called for the recognition and definition of collective right in substantive law, however it might supersede existing conceptions of individual right. The movement took political form and converged with the social objectives, aggressively advanced, of a great school of intellectual liberalism.

The result was reform; but reform spelled in the language of the bitter, political, social and economic controversy from which it stems.

The reform is reflected in a combination of national labor laws some of which, as administered, have been

1. *Milk Wagon Drivers' Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.* 312 U. S. 287; 85 L. Ed. 836.

2. USCA, Title 29, Sec. 101-115.

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looked upon as so pointed they amount to an over-correction of social injustice; the substitution of one evil for another.

In a background of the labor movement thus described we shall look to the Wagner Act³ but consider changes in the Norris-LaGuardia Act as matters of prior importance. The one statute is considered as creating an executive or quasi-judicial agency to enforce the employees' rights of organization and collective bargaining, the definition and prohibition of unfair labor practices by the employer; the other, for practical purposes, as establishing a national policy that the employees' wrongful resort to physical coercion in a very real sense shall be condoned.

If organized labor still were helpless to attain equity within the law and unable to reach the conscience of lawmakers and the courts, the expedience of the strike, as we have described it, would be justified at least by that reasoning which insists that law, if it is unreasonable, must be made reasonable.

But the Norris-LaGuardia Act was adopted before the collective rights of labor had become statutory and wage-earners invested with numerous other benefits of reformed social legislation. It was enacted to give effect not to the right of strike or peaceful picketing but to legalize the force of physical coercion and intimidation. It was enacted to strengthen the weapon of strike as the only method then available to enforce more tolerable terms of employment.

These better terms of employment now have been imposed directly or indirectly by law or made attainable by orderly processes of democratic government.

It thus becomes the theme of this essay that we are dealing with a group force which, though it once had an appealing cause for greater recognition in our economic, legal and governmental structure, now has been made so preponderant by political, legislative and judicial cooperation that it threatens either to invalidate the orderly processes of democratic government or invoke the precedents of history for its destruction.

It is believed that organized labor should have and now has a legal recognition of reasonable collective rights as illustrated by the Wagner Act, Wage and Hour and Social Security legislation. By the Wagner Act, reasonably amended and administered, with the economic and social benefits of other national labor laws, labor's collective interests, in the democratic way, may justly be harmonized with public interest and a fair diminution of individual right.

But by the additional force of the Norris-LaGuardia Act, labor retains certain class and group privileges now as unreasonable as once they were justified by labor's disadvantage in the economic struggle, its lack of favorable legislation, its necessity of resort to force.

Recall the peculiar origin, nature and function of equity jurisdiction. Note the showing of irreparable injury and inadequacy of other remedies required to

support the injunction. No actual disparity of legal right called for change in the true function or jurisdiction of equity. The Norris-LaGuardia Act was not enacted to supply any deficiency or cure any evils in equity jurisprudence or to improve the procedure of injunction. It was enacted to circumvent what was believed to be a prejudiced and unreasonable attitude of national court judges in the use of anti-strike injunctions.

However, that judicial attitude has been changed especially in courts of review which, in cases of injunction, may be quickly reached. Whether, retrospectively, we see the former judicial attitude as personal or as obedient to then existing law, it has been replaced by judicially enlightened and humanistic inclinations. By individual preference, as well as by sweeping reform of national labor relations law, the judicial approach in labor disputes is now sympathetic to labor. The well-being of workingmen is so plainly a paramount concern of the national court that, longer to assert that labor should refuse therein to submit its defense in equity on equal terms with others, is to doubt the validity of its position in the forum of equality and good conscience.

For these reasons the Norris-LaGuardia Act reasonably may be scrutinized to find what reason, if any, remains for some of its provisions. Neither the timidity of the critic nor the reader's sense of futility should be mistaken for evidence of the impossible.

True, the act does not expressly abolish the remedy of injunction in labor disputes. It is written in the form of regulation. In its purport there is an acknowledgment that the persons and property of citizens should be protected from violence. Nevertheless the act is a set of legalistic barbed wires thrown about the injunctive remedy. The obstacles of required proof and procedure inserted by its provisions in the way of the suitor in the ordinary case of strike intimidation are insurmountable.

To the extent that the act was intended to insure that a strike as a refusal to work should be lawful or that a picket as a peaceful exercise of freedom of speech should be protected, no criticism ever has been offered. That is so even though a notable result of the act has been to supply a legislative fiction and a judicial convenience of assumption that strikes and pickets at the factory gates customarily are not physical breaches of individual and public safety.

Our criticism is not entirely impelled by the well-known weakness and impotence of state courts, often unable or unwilling to cope with a major offensive of strike intimidation; nor induced by the fact alone that, in many instances of grievous wrong, only the mandate of a fair-minded national court removed from local influence and retaliation would command obedience and respect; nor by the fact that the mere existence of adequate national court jurisdiction in this field (in the frequent cases of diverse citizenship) would serve as a restraining and salutary influence.

3. USCA, Title 29, Sec. 151-158.

The point is that this statute, taken with other national labor relations laws, is a solemn declaration of an untenable national policy. The policy is that, notwithstanding the collective demands of this single class or group of citizens now are legally recognized as superseding and submerging rights formerly recognized in other classes and individuals, this group also shall be allowed to retain the privilege of coercion by physical threat and intimidation. Now the foremost beneficiary of peaceful government by law, it is allowed, so far as this national policy is concerned, to breach the peace and defy orderly government beyond the law's speedy and effective restraint.

The reader is trained in appraising the implications of statutory law, experienced in the practical necessities of effective and expeditious trial procedure. A mere reading of the Norris-LaGuardia Act will convince that the remedy of injunction, even when limited strictly to violence and physical intimidation, has been rendered inadequate, ineffective and useless. For that remedy a resort to tear gas bombs and the policeman's club never was a sensible alternative. Accordingly it is believed that the inviolable rules for the preservation of the democratic form of government now demand that labor, in equity, shall be made responsible and amenable in equality with others.

Interstate commerce is vital to national life, an instrument of national government. The scope of the operation of national labor relations laws depends on the factual limitations of interstate commerce. It was the liberal and humanistic contribution of the national court to the cause of labor that gave these laws a far-flung effect. Broadening the scope of interstate commerce the court was acting in its traditional capacity as the guardian of national right, recognizing national interest in the maintenance and protection of interstate commerce.

It therefore is a point of singular interest that if interstate commerce was wholly stopped and suspended by direct force and violence, the national court of equity for that reason would acquire no authority, under the Norris-LaGuardia Act in a labor dispute, to restrain that violence by speedy, adequate and effective injunction.

A temporary writ might be promptly issued for a period of five days.⁴ But even if the order were limited specifically to acts of physical violence and intimidation on the part of the labor organization and its officers, it indeed would be an extraordinary condition of fact out of which the writ later could be sustained. Unique rules to make impossible a reasonable degree of proof of union responsibility have been substituted for the law of *respondeat superior*.⁵ A trial under the act may disintegrate into a confusing multi-

plication of individual issues. In short, the labor organization, its officers and agents, cannot be held responsible for, nor restrained from, violence on the same evidence applicable to other groups and organizations in other fields of the law. The Norris-LaGuardia Act, in the exclusive interest of a single group, is a law to prevent the enforcement of law.

It was the growing economic influence of great corporate entities and the excessive power of their combinations that widened the disparity of right and well-being between private capitalism, as we have defined it, and labor. Thereby the workingman's inequality of bargaining power and liberty of contract was accentuated. During the half century of labor's effort which culminated in the law's removal of that disparity, the same power of corporate concentration and combination proved to be a public as well as a group menace. The public wrongs against which anti-trust laws and injunctive remedies have been directed are too well known to require specification. Pertinent however is the fact that the evils of monopoly and combinations in restraint of trade offended the same awakened social conscience that has so vigorously supported the cause of labor.

Nevertheless the Norris-LaGuardia Act bars the use of the injunction against labor unions when, in labor disputes, they violate the Sherman Act.⁶ The Clayton Act contains similar prohibitions given effect by the Norris-LaGuardia Act.⁷ Where the owners or managers of a unit or a combination of units of industry would promptly be enjoined from effecting conspiracies in restraint of trade and monopolistic and other practices inimical to public interest, organized labor may directly violate these laws which others must observe. Exempt from injunction by means of labor disputes it may produce the exact conditions the anti-trust laws were enacted to forbid. Labor unions, now can and actually do, use the weapon of the strike and physical boycott to produce monopolies in trade and commerce favorable to the corporate entity to which they are related.

It is believed these obvious incongruities in the Norris-LaGuardia Act ought not be perpetuated.

Consider the course of the labor movement as we have traced it, the continuing augmentation of its momentum, the economic imperatives of peace with which it ultimately may collide. It is not fantastic in the interests of labor to reflect that the greater the duration of privilege sustained by force the more likely is the event of a similar opposing force.

Formerly the national policy established by the Norris-LaGuardia Act might have been justified as a rule of retribution. But now it is believed that if labor organizations, as such, could be promptly and effectively restrained by the national courts from acts of physical

4. USCA, Title 29, Sec. 107, Subd. (c).

5. USCA, Title 29, Sec. 106 "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof

of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof."

6. *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U. S. 91; 85 L. Ed. 63.

7. *New Negro Alliance v. Sanitary Grocery Company*, 303 U. S. 552; 82 L. Ed. 1012.

violence and intimidation, the labor movement might be saved from the retortion it ultimately may invite. Democracy then would adjust itself to the collective interests of the group even as those interests, by law, are made superior to former rights of the individual. Labor would have the political influence of its numbers, its right of refusal to work and maintain peaceful pickets. It would be denied only the privilege of physical coercion and intimidation.

There is no thought here that the national court should be vested with some new authority in strike-breaking. The clash of physical forces in strike controversies is neither caused nor permitted by the writ of injunction. It is not a writ of ejectment. It is not a license, much less a mandate, for the submergence of physical force in a greater physical force. On the contrary it is an exact and effective method of avoiding such deplorable methods. That fact is recognized by the provisions⁸ which limit the use of the injunction to cases where the peace officers cannot or will not prevent injury to persons and property. An objectionable effect of the act is that it invites, if it does not compel, the use of force to clear the highways and put down violence and outlawry. A better way now would be the service of writs and bench warrants by the United States marshal acting under authority of a fair-minded national court, dealing with the officers and strike leaders of the organization in their true representative capacity.

The Norris-LaGuardia Act should be changed to subject the exercise of physical force and intimidation by organized labor to exactly the same remedies of prompt injunction based on the sufficiency of the same proofs adducible in the same manner of trial which would apply if other groups or individuals were involved. The union organization should be held responsible in law for those results the organization deliberately and in fact desires and brings about, determined by the same fair rules of evidence that would hold any other organization responsible. The rule of *respondet superior* should replace provisions which now repudiate that rule.

The act should be changed to remove the exemption of labor unions and combinations from injunction against violation of the anti-trust laws.

It is not overlooked that some states have modeled the Norris-LaGuardia Act into local statutory law. But similar state legislation was more or less automatically and undeliberately induced by the example of the national policy. It seems not unreasonable to expect that reasons sufficient to require corrections in the latter may reach the former.

These state laws have been noticed with the Norris-LaGuardia Act for another reason. They contribute to a disquieting apprehension which ought not be entirely excluded from expression. In the background the shadows of sinister events are lurking that, uninvited,

may intrude. These consequences are predictable if it need be admitted that a single pressure group of citizens, largely by sheer numbers and partly by physical force, may reach the position of such influence on the administrative, legislative and judicial branches of state and federal government that in reality it is the government.

Such a possibility can be lightly disregarded only by shallow thinking, indifference to the origin, the nature and the momentum of the labor movement, disobedience of historical warning and, especially, a failure to anticipate the economic abnormalities that world peace may disclose. As the new pattern of social science and statecraft is intended to be humanistic, it ought not ignore the restraints of moderation and tolerance, the requirements of universal well-being.

The relevance of all we have thus far noted may be emphasized as we turn to another chapter of national labor relations law.

The Wagner Act

The Norris-LaGuardia Act defines the things that employees and their organizations may do, forbidding interference by the employer. The Wagner Act defines the things the employer shall not do.⁹ The former law removes restraints on acts of the employees and their organizations; the latter imposes restraints on acts of the employer. But the two measures are not kindred of the same legislative purpose except as broadly they favor the group interests of labor.

As we have seen, the Norris-LaGuardia Act was adopted in 1932 when labor possessed no other means than the strike to enforce better terms of employment. Then, in 1935, the Wagner Act established the National Labor Relations Board whereby, in the process of collective bargaining, better terms of employment could be as they have been arrived at. Criticisms levelled at abuses permitted or encouraged in the administration of that act repeatedly have called for revisions. A popular notion prevails that regulatory measures aimed at mediation and a "cooling-off" period before strikes are called could be helpfully woven into corrections in the Wagner Act and its administration.

But if we assume any modifications of the substantive principles of the Wagner Act, any change in the National Labor Relations Board, any regulation of its procedure, any broadening of its jurisdiction, or enforced mediation and delay in calling strikes, there can be no valid reform so long as one party to every issue of mediation or trial retains the power of physical coercion upon the other; a coercion of such nature and scope, in its effect also on public convenience, that it may dictate abnormal judgments in its favor.

From some points of view, the executive and judicial administration of the Wagner Act, as reflected in common knowledge and court decisions, is thought to automatically point the way of desirable change.

8. USCA, Title 29, Sec. 107, Subd. (c).

9. USCA, Title 29, Sec. 158.

Academically and theoretically it has seemed tenable to advocate that the National Labor Relations Board be converted into an agency or superseded by another agency or court that might hear and determine the complaints of the employer as well as of the employee; that the law and its administration should be reformed to establish rules of evidence and orderly procedure more conducive to impartial judgment; that the procedure of strikes and the internal affairs of unions be regulated.

It is not doubted that in this, as in any type of controversy, the best expression of the democratic way of government would be the establishment of means to arbitration, a court of competent jurisdiction, fair procedure, and the insurance of impartial judgment. But if the laws to be recognized in arbitration and trial remain a contradiction of equality and justice, decisions will continue to be further evidence of inequality and injustice.

Laying aside the conditions and laws that are tolerable in time of war, reflection will demonstrate that the true reason for public concern over national labor relations laws is not the lack of regulation. It is the fact that a strike is permitted to be the assertion of physical force—the opposite of government by law.

A comprehensive revision of the Wagner Act, and adoption of regulatory measures over unions and strikes, without prior amendment of the Norris-LaGuardia Act, might further obscure and render less accessible the continuing proximate cause of a continuing evil. Thereby force would be conventionalized; the mailed fist would be gloved.

The Italian Precedent

Moreover a blue print does not always fully reveal the features most discernible in the completed building. Reference to the Italian experience and the creation of the Italian Labour Court will indicate how slight may be the point in the plan by which a structure in the democratic form is abandoned for something else; how easy it is to build on after building has commenced.

By a general strike all transportation and industry had been paralyzed. The unions had reached the point of physical possession and control of the industrial plant of the nation. But they could not put the wheels of industry and national finance into effective operation. Thus the on-looker was able without exertion to walk in and successfully take command of the situation.

It was inevitable that compulsion of government would follow. In time that compulsion was expressed in the formality of law. By the Labour Charter both lockouts and strikes were prohibited, made subject to prosecution.¹⁰ A Labour Court was created.¹¹ "All dis-

putes concerning collective labour relations" were made to fall within the Labour Court's jurisdiction.¹² But the rule for decision was not to be in accordance with the right of either party or the best interests of both parties to the dispute or the contract. In each instance the question for decision was to be, and still is: what conditions and terms of employment and management will best promote production and subserve the superior interests of the state. Within its jurisdiction the court can modify, abrogate or rewrite the contract of the parties as the interests of the state shall dictate.

Eventually there must be a constituted authority to hear and determine the issues of all controversies in the field of national labor relations, functioning under fair procedure with its impartial judgments made enforceable. That will be the democratic way.

But if, after such a plan were put in operation, one party to the labor dispute could and should continue to exert the excessive group influence we have noted, the next step almost certainly would be the invocation of a law to subjugate the right and the interest of both parties to the superior necessities of the state. *Thereby and in that process direction might be given to the definition of a new and undesirable form of state.*¹³

The Labour Charter compels the formation of employees' associations. It defines and compels collective bargaining. The Wagner Act expressly or by administration follows that precedent. Under the Labour Charter all disputes concerning collective labor relations fall within the jurisdiction of the Labour Court. Under the Wagner Act disputes of which the employees may complain fall within the jurisdiction of the National Labor Relations Board. Under the Labour Charter the judgment in a labor dispute shall "harmonize the interests" of the employers and employees but "in every case protect the higher interest of production." Under the Wagner Act the Board's powers are limited to enforcement of the demands of the employees and to restraint upon acts of the employer, within the definition of the employees' rights fixed by the law.

We may thus note a precedent for a Labour Court which fails in objectives compatible with the tenets of the democratic form because decisions are aimed to the assertion of an interest superior to that of either party to the labor dispute.

Equally undersirable, in the preservation of that democratic form, would be a labor court or agency of mediation asserting the supremacy not of the state but of one side to the dispute. The compulsion of decision in the one case by the superior force of the state is no less desirable than a similar compulsion would be if

(Continued on page 560)

10. Labour Charter, Introduction and Comment by Arnaldo Mussolini, Chap. III, Art. 11, p. 35. Juridical Discipline of Collective Labour Relations. Law of April 3, 1926, No. 563. *Gazzetta Ufficiale*, April 14, 1926, No. 87.

11. *Id.* p. 33.

12. *Id.*, Chap. II, Art. 13, p. 33.

13. *Id.*, p. 11: "The Italian Nation is an organism endowed with a purpose, a life, and a means of action transcending those of individuals, or groups of individuals. * * * the rights of the individual, as also the rights of the various social groupings, cease at the point where they threaten or impinge upon the rights of the State * * * not surrendering one jot of its responsibilities in the moral, political or economic field."

WHY WE MEET AND HOW

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE FOR EMERGENCY MANAGEMENT
WASHINGTON, D. C.

THE OFFICE OF DEFENSE TRANSPORTATION
JOSEPH B. EASTMAN, Director

July 9, 1942.

Mr. Walter F. Armstrong, President,
American Bar Association,
Commerce Title Building,
Memphis, Tennessee.

Dear Mr. Armstrong:

I am gratified by your letter of July 7 in regard to the forthcoming annual meeting of the American Bar Association. That the meeting will, in view of the present program of the Association, be closely related to the war effort I can appreciate. I am very glad, however, that so much is being done to skeletonize it and to confine the attendance to those who will participate actively in the business of the meeting, making it a strictly business occasion so far as possible. In so doing, the Association will help the passenger transportation situation materially. Those who plan to attend the meeting should also understand that they cannot be assured of normal passenger service under the conditions which may prevail at the time of the meeting, and may have to put up with some discomforts.

Very sincerely yours,

Joseph B. Eastman
Director.

AMERICAN BAR ASSOCIATION
Office of the President
WALTER F. ARMSTRONG
Commerce Title Building
Memphis, Tennessee

July 7, 1942.

Honorable Joseph B. Eastman,
Director of Defense Transportation,
Washington, D.C.

Dear Mr. Eastman:-

I am glad to be able to inform you that the American Bar Association in holding its annual meeting in August will cheerfully and completely comply with the suggestions you made to me in conversation, which were substantially the same as those which were embodied in your release that appeared in the newspapers on June 19th.

As has been explained to you, we are going forward with this meeting because of its close and direct connection with the nation's war effort. Since the mid-year session of our House of Delegates in March, most of our resources and personnel have been devoted to organization of the bar for war work. The annual meeting is necessary in order that this work may be expanded and made more effective.

Although we shall hold the meeting, we will, so far as possible, skeletonize it. We shall expect to be present those members of the House of Delegates, Committee Chairmen and the Sections. The attendance of those who do not expect actively to participate in the business of the meeting will be discouraged. Visitors and the families of members, who ordinarily come to enjoy the social side of the meeting, will not be expected. Indeed, all social affairs will be kept down to an irreducible minimum.

In holding a meeting such as this, we hope not to accentuate the burden already imposed upon the transportation systems and at the same time to increase our contribution to the common cause.

This latter hope is enhanced by the fact that the Canadian Bar Association will meet just across the river at Windsor, Ontario, at the same time our Association meets in Detroit, and will attend several of our sessions. Thus we shall have the benefit of the counsel of our Canadian brethren, and an opportunity still further to strengthen the good will which is already so strong a tie between our two allied countries.

Very sincerely yours,

Walter F. Armstrong

WFA/L

PROGRAM FOR 65th ANNUAL MEETING

AUGUST 24-27, 1942

DETROIT, MICHIGAN

THE ASSEMBLY

Monday, August 24

FIRST SESSION

Wilson Theatre

10:00 A.M.

Call to order by the President.

Addresses of welcome by Mr. Glenn M. Coulter, President of the Detroit Bar Association and Mr. Fred G. Dewey, President of the State Bar of Michigan

Response by Honorable Francis Biddle, The Attorney General of the United States

Response by Honorable Louis Stephen St. Laurent, K.C., LL.D., Minister of Justice and Attorney General of Canada

Annual Address of the President of the Association

Offering of Resolutions

Announcement of vacancies in offices of State Delegates and Assembly Delegates

Nomination and Election of Assembly Delegates to fill vacancies

Nomination of four Assembly Delegates for two-year term ending with adjournment of 1944 Annual Meeting

SECOND SESSION

8:30 P.M.

Wilson Theatre

JOINT SESSION OF AMERICAN AND CANADIAN BAR ASSOCIATIONS

Addresses by:

Colonel Honorable James Layton Ralston, P.C., K.C., C.M.G., D.S.O., LL.D., D.C.L., Minister of National Defence of Canada.

Sir Walter Monckton, K.C., K.C.V.O., of the English Bar

THIRD SESSION

Wednesday, August 26

9:30 A.M.

Wilson Theatre

Election of Assembly Delegates

Presentation of Award of Merit to a State and Local Bar Association

Presentation of Prize Award for 1942 Ross Bequest Essay

First Annual Meeting of the American Bar Association Endowment*

Statement of work of American Law Institute by Honorable Herbert F. Goodrich, Philadelphia, Pennsylvania

Report of the Resolutions Committee, Honorable Hatton W. Sumners, Texas, Chairman

*This meeting at which the President of the Endowment, Mr. Jacob M. Lashly, will preside, will be held for the purpose of electing two directors. All members of the Association are members of the Endowment.

ANNUAL DINNER

Ball Room, Statler Hotel

7:30 P.M.

The President, presiding

Presentation of the American Bar Association Medal

Addresses by:

Mr. James McGregor Stewart, K.C., B.A., LL.B., President of the Canadian Bar Association

Sir Owen Dixon, The Australian Minister to the United States

The Honorable Stanley Reed, Associate Justice of the Supreme Court of the United States

FOURTH SESSION

Thursday, August 27

Immediately following adjournment of the morning session of the House of Delegates

Ball Room, Statler Hotel

Report by Chairman of the House of Delegates of the action upon resolutions previously adopted by the Assembly

Action by the Assembly upon any resolutions previously adopted by the Assembly but disapproved or modified by the House

Unfinished business

New business

Presentation of new officers and members of the Board of Governors

Remarks by Incoming President

Adjournment

PROGRAM FOR 65th ANNUAL MEETING

THE HOUSE OF DELEGATES

STATLER HOTEL

August 24-27, 1942

The sessions convene promptly at 2:00 P.M. Monday, August 24; 2:00 P.M., Wednesday, August 26, and, if necessary, 9:30 A.M., Thursday, August 27. Items on the calendar will be considered in the order in which they appear.

Roll Call

Report of the Committee on Credentials and Admissions, Bernard J. Myers, Chairman, Pennsylvania

Approval of the record

Statement of the Chairman of the House of Delegates, Guy Richards Crump, California

Report of the Treasurer, John H. Voorhees, South Dakota

Report of the Chairman of the Budget Committee, Philip J. Wickser, New York

Report of the Board of Governors, Harry S. Knight, Secretary, Pennsylvania

Report of the Committee on Rules and Calendar (including proposed amendments to the Constitution), Thomas B. Gay, Chairman, Virginia

Election of Members of the Board of Governors, as prescribed by the Constitution, Article VIII, Section 3

Offering of resolutions for reference to the Committee on Draft

Reports of Committees:

Coordination and Direction of War Effort, Walter P. Armstrong, Chairman, Tennessee

Divisional committees:

War Work, Edmund Ruffin Beckwith, Chairman, New York

Civilian Defense, Philip J. Wickser, Chairman, New York

American Citizenship, Earl King, Chairman, Tennessee

Bill of Rights, Douglas Arant, Chairman, Alabama
Improving the Administration of Justice, John J. Parker, Chairman, North Carolina

International Legal Problems Raised by War Conditions (Section of International and Comparative Law) William E. Masterson, Chairman, Pennsylvania

Report to the House of Resolutions adopted by Assembly for action by the House

Consideration of Assembly resolutions

Reports of Committees:

Ways and Means, Howard L. Barkdull, Chairman, Ohio

Emergency Committee on Printing Costs and Publications, William L. Ransom, Chairman, New York

Public Relations, Jacob M. Lashly, Chairman, Missouri

Economic Condition of the Bar, Nathan William MacChesney, Chairman, Chicago, Illinois

Low-Cost Legal Service Bureaus, Nathan Cayton, Chairman, Washington, D. C.

Legal Aid Work, Harrison Tweed, Chairman, New York

Commerce, Oscar C. Hull, Chairman, Michigan
Securities Laws and Regulations, Talcott M. Banks, Jr., Chairman, Washington, D. C.

Customs Law, Albert MacC. Barnes, Chairman, New York

Facilities of the Law Library of Congress, Charles H. Leavy, Chairman, Washington

Law Lists, W. Leslie Miller, Chairman, Michigan
Professional Ethics and Grievances, Orie L. Phillips, Chairman, Colorado

Unauthorized Practice of the Law, Edwin M. Otterbourg, Chairman, New York

Judicial Selection and Tenure, John Perry Wood, Chairman, California

Judicial Salaries, William H. Watkins, Chairman, Mississippi

Jurisprudence and Law Reform, James William Moore, Chairman, Connecticut

Labor, Employment and Social Security, William L. Ransom, Chairman, New York

Administrative Law, Carl McFarland, Chairman, Washington, D. C.

Communications, John W. Guider, Chairman, Washington, D. C.

Admiralty and Maritime Law, Cody Fowler, Chairman, Florida

Aeronautical Law, Mitchell Long, Chairman, Tennessee

State Legislation, William A. Schnader, Chairman, Pennsylvania

Report of the National Conference of Commissioners on Uniform State Laws, William A. Schnader, President, Pennsylvania

Reports of Sections:

Public Utility Law, Robert E. Healy, Chairman, Pennsylvania

Bar Organization Activities, L. Stanley Ford, Chairman, New Jersey

Junior Bar Conference, Philip H. Lewis, Chairman, Kansas

Legal Education and Admissions to the Bar, Charles W. Racine, Chairman, Ohio

Patent, Trade-Mark and Copyright Law, Roy C. Hackley, Jr., Chairman, California

Criminal Law, James J. Robinson, Chairman, Washington, D. C.

Judicial Administration, Merrill E. Otis, Chairman, Missouri

Insurance Law, Clement F. Robinson, Chairman, Maine

Municipal Law, Barnet Hodes, Chairman, Illinois

International and Comparative Law, David E. Grant, Chairman, New York

PROGRAM FOR 65th ANNUAL MEETING

Commercial Law, John M. Niehaus, Jr., Chairman, Illinois
Taxation, George Maurice Morris, Chairman, Washington, D. C.
Real Property, Probate and Trust Law, Harold L. Reeve, Chairman, Illinois
Mineral Law, James T. Finlen, Jr., Chairman, Montana
Presentation of any matters which any state or local bar association or any affiliated organization of the legal profession wishes to bring before the House of Delegates
Presentation of any matters which any section or standing or special committee wishes to bring before the House of Delegates

Report of the Board of Elections: Edward T. Fairchild, Chairman, Wisconsin
Reports of House Committees:
Draft, John Kirkland Clark, Chairman, New York
Hearings, Joseph F. Berry, Chairman, Connecticut
Credentials and Admissions, Bernard J. Myers, Chairman, Pennsylvania
Membership, Wilbur F. Denious, Chairman, Colorado
Unfinished business
New business
The President in the Chair
Statement of certification of nominations for officers
Election of officers
Presentation of incoming Chairman of the House of Delegates

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

FIFTY-SECOND ANNUAL MEETING

August 18-22, 1942

Michigan Room, Hotel Statler

Detroit, Michigan

This tentative program is subject to change for considering drafts of proposed State War Legislation which may be suggested by the Attorney General of the United States or recommended by the Executive Committee of the Conference.

Tuesday, August 18

9:00 A.M.

Meeting rooms will be available for meetings of Sections and Committees prior to the hour of the opening session at 11:00 A.M.

FIRST SESSION

11:00 A.M.

Address of Welcome
Response
Roll Call
Announcement of Appointment of Nominating Committee
Address of President, William A. Schnader
Reports of other Officers, and Committees which have Reports requiring action by the Conference

SECOND SESSION

2:00 P.M.

Consideration of Final Draft of Uniform Administrative Procedure Act, E. Blythe Stason, Chairman.

8:00 P.M.

Section and Committee Meetings

THIRD SESSION

Wednesday, August 19

9:30 A.M.

Report of Nominating Committee and Election of Officers
Consideration of Revised Uniform Sales Act, Karl N. Llewellyn, Chairman.

FOURTH SESSION

2:00 P.M.

Consideration of Report of Committee and Tentative Draft of Uniform Act on Double Taxation of Intangibles, Henry S. Fraser, Chairman.
Consideration of Report of Committee and Tentative Draft of Uniform Act on Survival of Tort Actions and Death by Wrongful Act, Kingsland Van Winkle, Acting Chairman.

FIFTH SESSION

Thursday, August 20

9:30 A.M.

Consideration of Revised Uniform Sales Act, Karl N. Llewellyn, Chairman.

SIXTH SESSION

2:00 P.M.

(Members of the Canadian Conference of Commissioners on Uniformity of Legislation, which will be meeting at Windsor, Ontario, at the time of the annual meeting of the Conference, will be the guests of the Conference at this session.)

PROGRAM FOR 65th ANNUAL MEETING

Consideration of proposed amendments to the Uniform Narcotic Drug Act, Sidney Clifford, Chairman.

Consideration of proposed amendments to the Uniform Veterans' Guardianship Act, Frederick S. Tyler, Chairman.

Consideration of Report of Legislative Committee, Fred T. Hanson, Chairman.

Consideration of Report of Committee on Review and Revision of Uniform and Model Acts, Frank E. Horack, Jr., Chairman.

Consideration of Report of Committee on Cooperation with the Federal-State Conference on Law Enforcement Problems of National Defense, James C. Wilkes, Chairman.

Consideration of Report of Committee on Cooperation with the Council of State Governments, George G. Bogert, Chairman.

Consideration of Report of Special Committee on Uniform Vital Statistics Act, James C. Wilkes, Chairman.

SEVENTH SESSION

Friday, August 21

9:30 A.M.

Consideration of Revised Uniform Sales Act, Karl N. Llewellyn, Chairman.

EIGHTH SESSION

2:00 P.M.

Consideration of Report of Committee on Uniform Ancillary Administration of Estates Act, including

consideration of Tentative Drafts of Uniform Ancillary Administration of Estates Act and Uniform Powers of Foreign Personal Representatives Act, Fred T. Hanson, Acting Chairman.

Consideration of Report and Tentative Draft of Uniform Criminal Statistics Act, C. Walter Cole, Chairman.

4:30 P.M.

Memorials.

NINTH SESSION

Saturday, August 22

9:30 A.M.

Consideration of Revised Uniform Sales Act, Karl N. Llewellyn, Chairman.

TENTH SESSION

2:00 P.M.

Consideration of Deferred Uniform Acts

Consideration of First Tentative Drafts of Other Proposed New Uniform Acts

Unfinished Business

New Business

Adjournment

If necessary to complete the work of the Conference, additional evening sessions will be held as the Conference may provide. At the time of preparation of this tentative program some Committee Chairmen have not completed their reports, and such additional time as may be required will be provided for consideration of such additional reports.

HOTEL ACCOMMODATIONS FOR DETROIT MEETING

August 24-27, 1942

The Sixty-Fifth Annual Meeting of the American Bar Association will be held at Detroit, Michigan, August 24 to 27, 1942.

Hotel Accommodations

Official Headquarters—Statler Hotel.

Hotel accommodations, all with private bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin- beds for 2 persons	Two-room suites (Parlor and 1 bedroom)
Book-Cadillac (Michigan & Washington)	\$3.85-\$5.50	\$5.50-\$7.70	\$6.60-\$9.90	\$16.00
Detroit-Leland (Casey & Bagley)	3.30- 5.00	5.00- 5.50	6.00- 7.00	12.00
Fort Shelby (525 Lafayette)	2.75- 5.00	4.00- 7.00	4.90- 7.00	11.00- 16.00
Statler (Washington & Park)

(Advance reservations have now exhausted all space at Headquarters Hotel.)

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

THE CONVENTION CITY

By GEORGE W. STARK

Of the Detroit News

NEVER was there a more exciting time to visit Detroit. Delegates to the convention of the American Bar Association need scarcely be told that, for it is no military secret that in the great industrial area in and about the city lie the potentialities of the victory of the United Nations and the defeat of despotism the world over.

Naturally the visitor's largest curiosity lies in that phase of Detroit's majesty in this summer of 1942. Yet this city's claim to greatness has never been predicated on its ability to turn out the munitions of war. On the contrary, its direction has always taken the peaceful path and one of its proudest boasts is that it has dwelled in such close proximity to its Canadian neighbors across the river (little more than a stone's throw) with, since 1812, never a hostile gesture.

The guns at old Fort Wayne, the military successor of the historic palisades of Pontchartrain and Shelby, have never boomed except to signalize the setting of the sun. For more than a century, Canada and the United States have enjoyed a prosperous peace between governments and peoples and nowhere is such an object lesson to a quarreling world more clearly dramatized than at Detroit. Overhead, a great international bridge connects the two borders and beneath the swiftly-flowing river, a vehicular tunnel performs a similar service. Thus engineering and industrial skill emphasize the neighborly affection that obtains and grows steadily stronger through the years.

A City of Culture

Detroit is an old city, with an old tradition and an old culture; although it is hard to get the general run of people to believe that. So many people refuse to remember that

there actually was a Detroit before the automobile came just before the turn of the century. Away from its own precincts, the reputation of the town is based solely on the gasoline motor and some prejudiced persons are jealous enough to say that if Henry Ford had not been born here, Detroit would never have been heard of or from. Of course, that's sheer nonsense.

The tradition of the city is as old as that of the aristocratic metropolis of the Atlantic seaboard. Its early history is more glamorous than most. Its search for beauty has lacked the luster that might belong, shall one say, to Boston, because the emphasis in this last half-century has been upon industry and manufacturing. But there are constantly increasing evidences, obscured for the moment by the war effort, that industry and culture have actually walked hand in hand and in Detroit beauty is emerging in unsuspected places and forms.

This is a year of anniversaries in Detroit too and it is well to suggest them in this article, because they serve to point up a background that belongs to no other city in the west. In this year of total war, Detroit finds that it is observing the centenary of the beginning of free education. That's an important milestone and, if war had not intervened to claim the exclusive attention of all the leading citizens, something fine would have been done about it. Historians, looking into that phase of urban development, couldn't help but discover that it was just 100 years ago too that a man named Douglass Houghton was the mayor of their city. That was important, too, but even Detroiters have been slow to regard it so. It is the considered opinion of thoughtful people that Douglass Houghton had more to do with the development

of this city than any other person in its long history.

When he was only a beardless boy of 19 he was brought here from the East, Fredonia, N. Y., where he was already a professor of the Academy. General Lewis Cass and other town leaders had gone in search of a man suitable to give a series of lectures in Detroit, whose citizens were even then exhibiting their first deep yearnings for culture. The General was skeptical of Houghton's capacity, because of his extreme youth, but finally agreed to have him. So Douglass Houghton came to lecture, but he remained to teach and incidentally to learn something for himself.

Young Scientist's Contribution to World

This was about the soil of Michigan, which strangely interested him. He was an exceptional young man and the earth took him into its confidence and whispered its inmost secrets to him. The circle of his investigations grew wider and wider and finally, poking about among the rocks of the Upper Peninsula of Michigan, he learned that here was an inexhaustible storehouse of vital minerals, such as copper and iron.

It was a discovery that was to have a profound effect not only on Michigan and Detroit, but upon the entire world, for today, the raw materials that grew from Douglass Houghton's voyage of discovery flow in great argosies down the chain of the Great Lakes to implement the factories of Detroit, now dedicated to the arms of democracy. Thus it is seen that all civilization owes a tremendous debt to the young scientist from Fredonia, the boy Mayor of Detroit a century ago.

This is something not only for the visitor within Detroit's gates, but the dwellers therein too, to ponder well.

THE CONVENTION CITY

That Houghton was keenly aware of the importance of his discovery there is no doubt. He argued bitterly with a stubborn state legislature to grant him funds to continue his explorations. On one of these he met a tragic death, his frail boat being foundered in a Lake Superior gale. He was drowned.

But he had predicted a great industrial empire at Detroit, something that was foretold in one of the early legends of the town. For the story persists that before the great French adventurer and voyageur, Cadillac, left French Canada to pursue his perilous passage down the lakes that was to end with the founding of Detroit in 1701, his fortune was told by a seeress in the presence of a great company which had assembled to give him a farewell party at the old Castle of St. Louis in Quebec. "You will build a fort on the bank of a river," she is reported to have said. "The settlement will grow, but there are dark clouds and I see your star but dimly . . . The English and French will struggle for its possession . . . The Indians will be treacherous . . . But under a new flag, it will have more inhabitants than all of New France now possesses and it will assume a height of prosperity that even your wildest dreams do not conceive."

And in Douglass Houghton's own time came Capt. Eber Brock Ward, Detroit's first millionaire-industrialist, a visionary who was at the same time a hard-headed realist. He it was who rolled the first bar of industrial Bessemer steel ever made in America, in his down-river factory at Wyandotte. "Some day," said the great Captain, "this will be an industrial island of the greatest extent on this earth."

Artistic, Spiritual and Political Advancement

Well, so much for prophecy and so much for background. The visitor today will have little difficulty in spotting the evidence of industrial supremacy. But he will look about him for other indications of artistic,

spiritual and political advancement. It is well known that Detroit operates under a non-partisan government, whose theory is fundamentally sound, despite recent abuses of public office by unprincipled politicians. Its charter was penned by its brightest legal minds.

Spiritually, there are architectural indications that the newer generations have not forgotten the example of the founding fathers, who were so religious-minded that they built a church, even as the logs for palisades of old Fort Pontchartrain were being hewed and raised. Ste. Anne's was the first crude House of worship in this far outpost in the western wilderness. A Ste. Anne's Church still flourishes in Detroit. Lower Woodward avenue was once the street of churches. Most of them have been driven northward by the steady encroachment of business. But the sturdy Woodward Avenue Methodist still stands and a little farther north old St. John's Episcopal. Farther out are many others. On Washington Boulevard in the heart of the newer shopping district, is St. Aloysius (Roman Catholic). At Grand River and Trumbull avenues is Trinity Church, generally regarded as the purest example of Fourteenth Century Gothic architecture in all America. It was designed by George D. Mason, dean of the architects of Michigan, just turned 86 years of age, under whose influence and wise instruction fell many of the designers of Detroit's finest buildings. Indeed, Albert Kahn, who designed the Fisher Building, began his own brilliant career as an office boy for Mr. Mason.

Detroit, in its hundredth year of free public instruction, feels that it has come a long way. It has a splendid public school system, climaxed by its Wayne University, itself the center of an unparalleled cultural development, practically in the heart of the city. Units of this great development would be the buildings that form the city's art center, the Detroit Public Library, the Detroit Institute of Arts and the recently-completed Rackham Educa-

tional Memorial Building. All three are noble examples of the architect's art and skill, fitting shrines for the treasures housed within them.

In common with many great musical organizations, the Detroit Symphony Orchestra has come into the fullness of its powers after years of struggle. Its concerts in recent years have been played in the beautiful auditorium of the Masonic Temple, itself one of the most stunning architectural creations in Detroit and again the product of the veteran Mr. Mason's genius.

There is a great deal to see in Detroit and about it. Nature has been lavish in providing lovely settings for residential district developments. Detroit is still a city of homes, occupied by friendly people.

Sports-Minded, Too

It's a sports-minded metropolis, too, as you would appreciate more fully, if the emphasis just now were not entirely on the war. There are sporting golf courses all about, but if you prefer to watch a professional baseball game, you are privileged to do so in the comfort and with the convenience of one of the finest baseball plants in America, developed by an industrial genius, too. Briggs Stadium by Walter O. Briggs is something the town folks are very happy about and something they will return to in greater numbers as soon as the present job of war-making is successfully concluded.

The anxious host in Detroit has plenty of material at his disposal with which to entertain even the most captious guest. You are never allowed to forget that the city is the gateway of the greatest chain of inland lakes in all this world. Palatial steamers ply them, night and day.

What a comfort in these times! You require neither an ocean nor an ocean liner to enjoy the sensations of a real voyage, with all the sea-going trimmings. And there's something else to consider in these disturbing days. These boats don't run on rubber!

AMERICAN BAR ASSOCIATION JOURNAL

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The Detroit Meeting

THE correspondence between President Armstrong and Director of Defense Transportation Eastman, printed in this issue, fully discloses the reasons for holding this year's annual meeting and the nature of the meeting that will be held.

Under conditions as they now exist, the decision is wise. The Association holds too important a place in American life and is making too valuable a contribution to the nation's war effort for its activities to be interrupted by the cancellation of this annual meeting unless there is an urgent necessity for that course.

The attendance of members of the House of Delegates, of Committee Chairmen and of those necessary to man the sections will not perceptibly tax transportation.

The President does not attempt in his letter to say to any members that they cannot attend. That he has no authority to do. The decision must rest with each member. Anyone has a right to attend. We have no doubt, however, that the suggestion that the meeting be skeletonized will be cheerfully heeded.

The members who do not attend will be missed. Especially shall we regret the absence of the ladies, whose presence does so much to make our annual meetings the delightful occasions they have come to be.

Abbreviated though the meeting will be, it will comply with the Constitution, enable us to carry on and to attempt to devise means by which we can further aid in the conduct of the war.

There will be sessions of the Assembly as well as the House of Delegates. True, the Assembly cannot be as representative as it usually is. The good judgment of the members in attendance can be trusted to see that this does not result in any ill considered action.

Associate Justice George Sutherland

ASSOCIATE Justice George Sutherland, who retired from the Supreme Court of the United States in January, 1938, died suddenly and peacefully in his bed on July 18 of this year.

Although born in England about a year and a half before he arrived in the United States, George Sutherland was for all practical purposes a product of our institutions, our culture, and our environment. He was admitted to the bar of his adopted state, Utah, before he had attained his majority, and rose to prominence at the bar. He was elected and served as President of the American Bar Association. He won a place in the political contests of the west, was elected to Congress and served in the United States Senate for twelve years. In October, 1922, President Harding appointed him to membership on our highest Court.

In an address before the American Law Institute in May, 1938, Chief Justice Hughes, in reporting to the Institute on the work of the Supreme Court of the United States, said: "Justice Sutherland came to the court after a notable public career as a member of the House of Representatives and the Senate of the United States. Like Justice Van Devanter, he had his training in the west and he was familiar with all the peculiar problems of the new states formed from our great western acquisitions. He had a special aptitude for the law, and his powers of analysis and exposition, his industry, and thoroughness, have made his judicial opinions a highly important part of the jurisprudence of the Court. He has been the embodiment of judicial integrity—conscientious and independent. Bearing his full share of the work of the Court, unflagging in his labors, he never failed in courtesy and his keen sense of humor and his rare ability as a raconteur made his companionship one of the special privileges of the intimate association of the members of the Court."

May we refer our readers to the editorial published in our February, 1938, number (24 A.B.A.J. 133). There may be found the letter of the justices to their retiring associate of many years and Mr. Justice Sutherland's reply to his brethren. Those letters disclose the affectionate relations which existed between Mr. Justice Sutherland and all the members of that high Court.

Time is lacking for more than these few and inadequate words, but in October, soon after the reassembling of the Supreme Court, the life record of this jurist who attained so high a rank will be presented by those in a position to know whereof they speak.

WAR FOR PRESERVATION OF HUMANITY*

By HON. OWEN J. ROBERTS

Associate Justice, Supreme Court of the United States

WHEN the safety and the sanity of the world are threatened, men band together to defend themselves. It was a coalition that defeated Napoleon at Waterloo in 1815. It was a group of Allies that turned back the Imperial Germany in 1918. And today, in the face of a threat more dangerous than any of the past, free men have united once more to fight for their liberty.

You have often heard that this war is a war of ideas. It is that—a war between the idea of freedom and the idea of scientific slavery, between the dream of happiness and the nightmare of despotism. But it is more than that. It is a war for the preservation of humanity.

For a defeat of the United Nations would mean a world of terror and tragedy. It would mean an insane world where a few men at the top of the heap would live out their hysterical lives trampling the millions under their heels. It would mean fear and want for the many, and degeneracy and power for the few. That is what it would be like if the Axis won.

The Axis will not win. Twenty-eight peoples, on every continent, have signed a solemn agreement with their blood, pledging to fight on until freedom and sanity return to a war-weary earth.

In recent weeks, many have talked of the kind of world we consider worth fighting for. In the midst of the bloodshed and the tragedy, we have talked of future peace.

But, to attain that future peace, we must win this war. Out of what we do today will come the orderly world of tomorrow. . . . The way we fight our war now will control the way we build our peace later. One leads inexorably into the other. And if we fail now, we shall have no chance to succeed later.

Let us consider this United Nations war against Axis tyranny.

Here are twenty-eight nations. They differ in language, in climate, in religion, in form of government, in the very way their people live. To the stupid man, the only reason for their unity is this negative reason—they have a common foe.

But the stupid man will not recognize that the common foe is no ordinary foe. He is the very personification of evil. And, by forcing the world to take sides once and for all, the foe we face has helped free men everywhere forge anew the revolutionary idea of human liberty. Every human being, everywhere, whether he be American or Russian, Briton or Chinese, European or Latin American, has had to make his choice. He has been forced by the very existence of Axis evil to decide whether he will make his stand now, for the

things he believes, or whether he has lost all faith in his own integrity.

Thus, the unity of the United Nations is a unity based upon enlightened self-interest. It is compounded out of the knowledge that only a sane society can give all mankind enough food to eat, enough clothes to wear, enough homes to live in. It is infused with the desire of every human being for the things he likes: whether what he likes is a symphonic concert on the air, or a heated political argument, or the quenching of his thirst for knowledge—or, indeed, all of these things together.

The United Nations are united because its peoples are enlightened in their self-interest. We fight because we know that we cannot have the things we want so long as there are others with power to take those things away from us. And we have learned that, if we permit those things to be taken away in far-off lands, we are permitting the common foe to grow stronger.

This is not the philosophy of abstract humanitarianism. This is the common sense of simple self-preservation.

That is why the United Nations are united. That is why we are slowly forging a world coalition fighting a world war on world terms, with a world strategy. For this, we are traveling toward the united military front, the united economic front, the united political front, that will in the end destroy the transgressors, east and west. . . .

And success will be achieved only if the United Nations remain united, in war and in peace. They will remain united only if the people in every land are able to work and plan and carry out their tasks with mutual understanding and cooperation.

Once let the tide of nationalistic prejudice and suspicion sweep over us, and we are lost to the enemy. He sees that as clearly as we must. That is why the Axis strives always to split our unity asunder. That is why those who criticize Britain for her mistakes, without knowing all the facts, are endangering their lives and our lives as well. That is why, whatever some of us may have thought of the Soviet philosophy in the past, we must remember that Russia's fight is our fight, and that we must help her as she is helping us. That is why we must acclaim the emergence of China as a great and enlightened world power, newest and yet oldest in the family of nations.

Out of the unity we forge today will come the happiness we shall enjoy tomorrow. For here, in the midst of war, free men are fighting for peace.

That is the true concept of the United Nations. It is a concept worth dying for, a concept worth surviving for.

*A radio broadcast made from Philadelphia, July 5, 1942.

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

Criminal Procedure—Due Process—Coerced Confessions

The conviction of an ignorant negro through use of a confession obtained by long questioning, and threatened mob violence, and holding incommunicado without friends or counsel, and taking at night to a lonely place for questioning, must be set aside as a denial of due process of law.

Ward v. Texas, 86 Adv. Op. 1101; 62 Sup. Ct. Rep. 1139; U. S. Law Week 4419. (No. 974, decided June 1, 1942.)

Certiorari was granted here to determine whether a defendant charged and tried and convicted of murder by a Texas court had been denied the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution because of use by the prosecution at the trial of a confession which was charged to have been obtained by coercion and duress.

The opinion by Mr. Justice BYRNES holds that the confession was coerced and that the conviction must therefore be set aside. It first reviews the facts in some detail, pointing out that the state appellate court had ruled that on the evidence no conviction could be sustained without the confession, but since there was a conflict of evidence with respect to the issues upon which the admissibility of the confession depended, and the question of admissibility was solely for the jury, it must sustain the conviction.

The opinion then observes that although each state may prescribe tests governing the admissibility of a confession, and these may be different in different states, yet when the question whether a defendant has been denied due process of law is properly raised the Supreme Court is not precluded by a jury verdict from determining whether, under the circumstances, the confession was obtained in such a manner that its admission in evidence violated the Constitution.

The opinion next reviews the events leading up to the signing of the confession. The defendant was a negro, employed as a house servant of a judge of Mount Pleasant, in Titus County, where the crime was committed. When he was first questioned he pleaded innocent, and at the request of his employer, was released. During the next two days he was several times questioned again but not arrested. On the night of the third day while the defendant was at a church party in Mount Pleasant he was seized, handcuffed, and taken into custody by the sheriff of the adjoining county of Morris, who took him to Harts Creek where he had arranged to meet one of the constables of Titus County who had previously questioned the defendant. He was then taken to Daingerfield in Morris County, where the deceased had lived, then to Pittsburg in Camp County, and then

to Gilmer in Upshur County where he spent the night in jail. The next night he was returned to Pittsburg and spent the night in jail there. The constable next placed him in custody of highway patrolmen in Tyler in Smith County. A half hour later they took him to the sheriff in Athens in Henderson County, 110 miles from his home, where the confession was signed, after which he was returned to Tyler and later to Gilmer to await trial. It was charged and denied that the defendant was whipped, beaten and burned by the sheriff before whom the confession was made, and all officers denied mistreating the defendant.

The opinion then points out that even if it is conceded that questions of physical mistreatment were conclusively resolved by the jury verdict, still the arrests and detention were illegal under Texas law, and that contentions that removal from Titus County was to protect the defendant from threatened mob violence are vague and do not explain the officers' activities.

It concludes that under the circumstances the defendant was "no longer able freely to admit or to deny or to refuse to answer, and that he was willing to make any statement that the officers wanted him to make." It observes that confessions extorted from ignorant persons, subjected to persistent and protracted questioning, or threatened with mob violence, or held unlawfully incommunicado without advice of friends or counsel, or taken at night to lonely and isolated places for questioning have been held to invalidate confessions and that any one of these alone would be cause to set aside conviction. It concludes that since all of them were present here, the confession was obtained in violation of due process.

The case was argued by Mr. Leon A. Ransom and Mr. William Robert Ming, Jr., for petitioner, and by Mr. Pat Coon and Mr. Spurgeon E. Bell for State of Texas.

Due Process—Criminal Procedure—Right to Counsel: Jurisdiction of Supreme Court, "Court" and "Final Judgment" Defined

The due process clause of the Fourteenth Amendment does not require that in every case, whatever the circumstances, one charged with crime who is unable to obtain counsel must be furnished counsel by the state, and thus does not adopt for state procedure the requirement of Federal procedure guaranteed by the Sixth Amendment.

The judgment of the Chief Justice of the Maryland Court of Appeals on an application for a writ of habeas corpus is a judgment of a "court" reviewable by certiorari in the Supreme Court.

Such a judgment is also "final" and thus within the jurisdiction of the Supreme Court in its power to review final judgments of the highest state court in which a decision may be had.

*Assisted by JAMES L. HOMIRE and LELAND L. TOLMAN.

REVIEW OF RECENT SUPREME COURT DECISIONS

Betts v. Brady, 86 Adv. Op. 1116; 62 Sup. Ct. Rep. 1252; U. S. Law Week 4435. (No. 837, decided June 1, 1942.)

Certiorari was granted here to review important jurisdictional questions and conflicting decisions on constitutional questions, in a habeas corpus proceeding instituted in Maryland before a judge of the Court of Appeals of that state. Betts, the petitioner, was indicted in a county court of Maryland for robbery, and when arraigned informed the judge that due to lack of funds he could not employ counsel, and he asked the court to appoint counsel for him. The trial judge denied the request, saying that it was not the practice in that county to appoint counsel for indigent persons except in prosecutions for murder and rape. Betts reserved his rights to counsel, pleaded not guilty, waived jury trial, and was found guilty and sentenced after summoning witnesses, cross-examining and examining witnesses, attempting to establish alibi, and being offered and refusing to take the stand in his own behalf.

He then applied for habeas corpus to another county court, complaining of deprivation of his right to counsel. The writ was issued, heard, and the claim rejected. He then petitioned for another writ, the one from which the proceeding here involved was appealed, to Chief Judge Bond of the Maryland Court of Appeals, again asserting deprivation of constitutional right under the Fourteenth Amendment to be assisted by counsel. A hearing was held, at which agreed facts were offered, the writ was granted, but the relief asked was denied, and the certiorari proceeding was commenced.

The opinion of the Supreme Court by Mr. Justice ROBERTS first examines the question whether Judge Bond's judgment was that of a "court" within the meaning of § 237 of the Judicial Code which permits the Supreme Court to review by certiorari state court judgments in "any cause wherein a final judgment . . . has been rendered . . . by the highest court in which a decision could be had."

After extensive review of the jurisdiction of judges under Maryland law to grant writs of habeas corpus, and of other Supreme Court decisions on the question, the opinion concludes that Judge Bond acted in a judicial capacity and was, himself, a tribunal with jurisdiction to hear and adjudicate the issue here presented, and that in so acting he exercised judicial powers; that therefore his judgment was that of a "court" within the meaning of the statute.

The opinion next approaches the question whether the judgment of Judge Bond complied with the statutory requirement that it must be a final judgment of the highest court that could decide the question. Again Maryland law is consulted and the opinion finds that the judgment was final in the sense that an order of a Maryland judge in a habeas corpus case, whatever the court to which he belongs, is not reviewable by any other court in Maryland except in certain inapplicable

instances. It concedes that the petitioner might apply successively to one judge or court after another without exhausting his right, but concludes that this circumstance does not deprive the judgment of the finality necessary for a review by the Supreme Court.

The opinion then examines the question whether the trial court procedure violated the due process clause of the Fourteenth Amendment because of the refusal to appoint counsel at the defendant's request, and concludes that it did not. Stating the question before it, the opinion says:

The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state. Expressions in the opinions of this court lend color to the argument, but, as the petitioner admits, none of our decisions squarely adjudicates the question now presented.

Mr. Justice ROBERTS points out that the Sixth Amendment applies only to trials in Federal courts, that the Fourteenth Amendment due process clause does not incorporate as such the specific guarantees of the Sixth, though a denial by a state of rights specifically embodied in that and the other first eight amendments may in certain circumstances or with other elements operate in a given case to deprive a litigant of due process under the Fourteenth Amendment. Speaking of the phrase "due process" the opinion states:

. . . The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

Reviewing the precedents on which Betts relied, the opinion concludes that they do not decide that due process requires that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defender. It observes that the right to counsel under the Sixth Amendment has been construed

. . . to require appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, and where the right has not been intentionally and competently waived.

It then examines the question whether a similar rule must now be established for the conduct of the states under the Fourteenth Amendment. This examination is made by reference to the Constitutional provisions in force in the colonies prior to the adoption of the Federal Bill of Rights, and in the constitutional, legislative and judicial history of the states to the present date.

REVIEW OF RECENT SUPREME COURT DECISIONS

After reviewing these provisions, the opinion concludes:

This material demonstrates that, in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

* * *

To deduce from the due process clause a rule binding upon the states in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: "Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it." And indeed it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner logic would require the furnishing of counsel in civil cases involving property.

As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, and Mr. Justice MURPHY, dissented. They open their opinion by stating that a holding which would offer Betts a constitutional right to counsel in this case does not require a holding that no trial of any offense or in any court can be fairly conducted unless defendant has counsel. They would decide the case on the narrower ground that in view of the nature of the offense and the circumstances of trial and conviction Betts was denied the procedural protection the Constitution guarantees. The dissent states the belief that the rule regarding the right to counsel in Federal courts, applied under the Sixth Amendment, which would have required reversal if applied in this case, is equally applicable in state courts by virtue of the Fourteenth Amendment. It concedes, however, that this is a view expressed only in dissent, never accepted by the majority of the Court, and that therefore a statement of grounds for the belief is unnecessary.

The dissent proceeds, however, to state that even under the prevailing view of due process, as stated in the majority opinion, the judgment should be reversed.

The dissent also includes an appendix, giving

detailed, classified references to the law of the several states on the question of the right to counsel.

The case was argued by Mr. Jesse Slingsluff, Jr., and Mr. G. Van Velsor Wolf for Betts and by Mr. William C. Walsh and Mr. Robert E. Clapp, Jr., for respondent.

Jurisdiction and Procedure of Federal District Courts— Federal Declaratory Judgments Act

A federal district court has jurisdiction of applications for declaratory judgments, but there is no compulsion to exercise that jurisdiction. The court should in the exercise of its discretion determine whether in view of all the circumstances a declaratory judgment was warranted.

Brillhart v. Excess Insurance Company of America, 86 Adv. Op. 1136; 62 Sup. Ct. Rep. 1173; U. S. Law Week 4415. (No. 772, decided June 1, 1942.)

Certiorari was granted here to review the action of a Federal district court in Kansas in dismissing a suit by the Excess Insurance Company for a declaratory judgment to determine its rights under a reinsurance contract made by it with the Central Insurance Company of Chicago, by which the Excess Company agreed to reimburse Central for losses sustained by Central under automobile public liability policies issued by it; and Central agreed to notify Excess of accidents that might be covered by the reinsurance agreement. The accident here in issue occurred in 1934 and death resulted from it. The truck which was involved was leased by Cooper-Jarrett, Inc., which had been insured by Central. Central refused to defend a suit arising out of the accident, brought in the Missouri state court, claiming the policy did not cover the accident. During pendency of the suit Central was liquidated and all claims against it barred by an Illinois court and Cooper-Jarrett, Inc. underwent reorganization proceedings in a Missouri federal court and was discharged of any judgment that might be rendered in favor of the accident claimant. A default judgment was then entered in the Missouri state court proceeding, and the accident claimant instituted garnishment proceedings against Central. Being unable to realize any part of its judgment, it then made Excess a party to the garnishment proceeding by service on the Missouri Superintendent of Insurance. In the meantime, Excess instituted in Kansas the declaratory judgment suit here involved. The motion to dismiss this suit was based on the ground that the issues could now be decided in the garnishment proceeding in the Missouri court, and was apparently granted because of reluctance to prolong the litigation and without consideration of the question whether, under Missouri law, the claims asserted in the declaratory judgment suit could be raised in the garnishment proceeding. The circuit court held the dismissal to be an abuse of discretion, and reversed the judgment with directions to the district court to proceed to determine the merits.

The opinion of the Supreme Court by Mr. Justice FRANKFURTER holds that the circuit court must be reversed, and the case remanded to the district court not

for a determination of the merits, but for the proper exercise of the district court's discretion in passing upon the motion to dismiss. It holds that although the district court had jurisdiction under the Federal Declaratory Judgments Act, there is no compulsion upon it to exercise that jurisdiction and that the question before it was the correctness of the claim that since another proceeding was pending in a state court, a declaratory judgment was not warranted. Discussing this point, the opinion proceeds:

Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

We do not now attempt a comprehensive enumeration of what in other cases may be revealed as relevant factors governing the exercise of a district court's discretion. It is enough that it appears from the record before us that the District Court did not consider whether, under applicable local law, the claims sought to be adjudicated by the respondent in this suit for a declaratory judgment had either been foreclosed by Missouri law or could adequately be tested in the garnishment proceeding pending in the Missouri state court. This was a matter for determination, certainly in the first instance, by the District Court. . . . It is not our function to find our way through a maze of local statutes and decisions on so technical and specialized a subject as the scope of a garnishment proceeding in a particular jurisdiction. For one thing, it is too easy to lose our way. For example, there are numerous decisions of the Supreme Court of Missouri which declare a general principle that the garnishee can assert any defenses in a garnishment proceeding that would be open in a suit brought against him by the judgment debtor. . . . We are not concerned here with the burden of proof in establishing facts as to which only the parties to a private litigation are interested. We are concerned rather with the duty of the federal courts to determine legal issues governing the proper exercise of their jurisdiction.

Mr. Justice DOUGLAS concurred in the result, pointing out that for him the controlling question is whether the claims raised by Excess were previously foreclosed under Missouri law. He briefly reviews Missouri law on the question and concludes:

The exercise of jurisdiction under the Federal Declaratory Judgments Act is certainly not compulsory; it is discretionary. . . . If it may fairly be said under Missouri law that respondent was bound by its failure or refusal to defend the earlier suit after notice, then it would clearly be an abuse of discretion for the District Court to take or at least to retain jurisdiction of the cause in case it appeared after a hearing on that issue that respondent was so bound.

The CHIEF JUSTICE, joined by Mr. Justice ROBERTS and Mr. Justice JACKSON, and with whom Mr. Justice DOUGLAS would have agreed were it not, as he states in his separate opinion, that he thinks the issues are broader, dissented. The dissenters believed that the

district court should proceed to adjudicate the merits. The gist of their argument appears in the following quotation from the dissenting opinion:

The Missouri law, if not conclusively against the assertion of the present cause in the Missouri garnishment proceeding, is at least so doubtful that respondent ought not to be compelled to seek the futile prophecy of the district court in Kansas as to how the Missouri courts will resolve an unsettled point of Missouri practice. Since petitioner has failed to sustain his burden of showing that the case is a proper one for dismissal, the district court should exercise its jurisdiction by proceeding to determine the merits without further delay. If this litigation is ever to end, it is important for it to get started.

The case was argued by Mr. Clarence C. Chilcott for Brillhart and by Mr. Dick H. Woods and Mr. Paul R. Stinson for Excess Insurance Co.

Equal Protection—Oklahoma Habitual Criminal Sterilization Act

The Oklahoma Habitual Criminal Sterilization Act of 1935, which provides for the sterilization of persons convicted in Oklahoma of crimes amounting to felonies involving moral turpitude, after two or more previous convictions of such felonies and after a proceeding in which their status as habitual criminals, and the question of whether the operation will be detrimental to the defendant's general health are determined, is violative of the equal protection clause of the Fourteenth Amendment and is therefore unconstitutional.

Skinner v. Oklahoma, ex rel. Williamson, 86 Adv. Op. 1130; 62 Sup. Ct. Rep. 1110; U. S. Law Week 4424. (No. 782 decided June 1, 1942.)

Certiorari was granted in this case to determine the constitutional validity of an Act of the Oklahoma legislature, enacted in 1935, which provides for the sterilization of certain "habitual" criminals. It defines as an habitual criminal any person who, having been convicted two or more times for crimes amounting to felonies involving moral turpitude by a court of any state, is thereafter convicted of such a felony in Oklahoma, and sentenced to imprisonment in an Oklahoma penal institution. The Attorney General is authorized by the Act to commence a proceeding against such a person for judgment that he be rendered sexually sterile. Rights of notice, hearing and jury trial are provided, and the issues to be determined are confined to the questions whether the defendant is an "habitual criminal," and may be rendered sexually sterile without detriment to his general health. If these questions are affirmatively found, the court must render judgment that an operation of vasectomy, in case of a male, or salpingectomy, in case of a female, be performed to effectuate sterility. The Act explicitly excepts from its terms offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, and political offenses.

The defendant in this case was convicted in 1926 in Oklahoma of stealing chickens, and in 1929, and again in 1934 of robbery with firearms. Proceedings for sterilization were instituted in 1936 and resulted in a judgment directing the operation of vasectomy to be performed. The judgment was upheld against objec-

tions on Constitutional grounds by a five to four decision of the Oklahoma Supreme Court. On certiorari, it was urged that the Act was invalid under the Fourteenth Amendment as it did not fall within the state police power, that it lacked due process, and that being penal in nature, it provided for cruel and unusual punishment.

The opinion of the Court by Mr. Justice DOUGLAS holds that, irrespective of all other objections to constitutionality, the Act is invalid since it does not meet the requirements of the equal protection clause of the Fourteenth Amendment. Speaking of the inequalities of the Act, the opinion gives the following examples:

... In Oklahoma grand larceny is a felony. . . . Larceny is grand larceny when the property taken exceeds \$20 in value. . . . Embezzlement is punishable "in the manner prescribed for feloniously stealing property of the value of that embezzled." . . . Hence he who embezzles property worth more than \$20 is guilty of a felony. A clerk who appropriates over \$20 from his employer's till . . . and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony . . . ; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. . . . Hence no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. Thus the nature of the two crimes is intrinsically the same and they are punishable in the same manner. Furthermore, the line between them follows close distinctions—distinctions comparable to those highly technical ones which shaped the common law as to "trespass" or "taking". . . . There may be larceny by fraud rather than embezzlement even where the owner of the personal property delivers it to the defendant, if the latter has at that time "a fraudulent intention to make use of the possession as a means of converting such property to his own use, and does so convert it". . . . If the fraudulent intent occurs later and the defendant converts the property, he is guilty of embezzlement. . . . Whether a particular act is larceny by fraud or embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose—a question for the jury under appropriate instructions.

The opinion proceeds to point out that despite the broad scope of classification permitted to the states under the equal protection clause, the legislation here involved establishes such artificial lines that it cannot stand. As to this, the opinion says:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. . . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious

a discrimination as if it had selected a particular race or nationality for oppressive treatment. . . . Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. . . . Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. . . . Embezzlers are forever free. Those who steal or take in other ways are not. If such a classification were permitted, the technical common law concept of a "trespass" . . . based on distinctions which are "very largely dependent upon history for explanation" . . . could readily become a rule of human genetics.

The opinion then considers whether the broad severability clause of the statute would solve the equal protection difficulty. As to this, it concludes that the question is one that may be more appropriately left to the state court. It points out that it is by no means clear whether, if an excision were made in the law, the constitutional difficulty might be solved by enlarging on the one hand or contracting on the other, the class of criminals who might be sterilized.

The CHIEF JUSTICE concurred in the result but gave a separate opinion, stating doubt that the equal protection clause was a proper ground for the decision. It is his view that the real question turns upon whether "the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that he is not the type of case which would justify resort to it, satisfies the demands of due process." He observes that the hearing afforded the defendant under this Act is not a hearing and opportunity to challenge the existence in him of the only fact which would justify so drastic an operation, i.e., whether or not his criminal tendencies are of an inheritable type. Proceeding with this argument he says:

Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend—not can there be any pretense—that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any particular individual cannot rightly be dispensed with. Whether the procedure by which a statute carries its mandate into execution satisfies due process is a matter of judicial cognizance. A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process. . . . And so, while the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its

objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects.

Mr. Justice JACKSON also concurred in the result, but filed a separate opinion in which he joined the CHIEF JUSTICE in holding the hearings provided to be too limited to satisfy due process, and also agreed with the majority that the scheme of classification denied equal protection. He expressed disagreement with each, in so far as it tended to reject or minimize the grounds taken by the other.

He observes also that there are other grave questions of constitutionality, not discussed in either opinion, upon which, since the Act falls without them, he reserves judgment. In this connection he refers to cases in which sterilization with respect to imbeciles, with definite observable characteristics, has been sustained, but points out:

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.

The case was submitted by Mr. W. J. Hulsey, Mr. H. I. Aston, and Mr. Guy L. Andrews for petitioner and by Mr. Mac Q. Williamson for respondent.

Criminal Procedure—Grand Jury—Equal Protection of Law—Exclusion of Negroes from State Grand Jury Panel

Hill v. Texas, 86 Adv. Op. 1090; 62 Sup. Ct. Rep. 1159; U. S. Law Week 4442. (No. 1119, decided June 1, 1942.)

Certiorari was granted to review the conviction by a Texas court of a negro. It was charged that negroes had been excluded from the grand jury which returned the indictment and had been excluded from grand juries for many years. In the Texas court there was testimony that of the 66,000 poll tax payers in the county, 8,000 were negroes; that the total negro population was at least 55,000; that no negroes had been called to serve on the grand jury for at least 25 years, because it was thought by the local officials that even if qualified they would not be good jurors.

The opinion by Mr. Chief Justice STONE points out that the 1930 census showed only 7.5% of the negro population of the county to be illiterate, that the 1940 census showed 17,263 male negroes in the county over 25 years of age, that over 16,000 of these had attended grade schools or higher institutions of learning, and that the total population of the county was 398,564, of whom 61,605 were negroes.

The opinion then concludes that the showing in the Texas court made out a prima facie case, which the state failed to meet, of racial discrimination forbidden by the Constitution. It observes that a person whose conviction is reversed on this ground need not go free

for he may be reindicted and tried, if the procedure conforms to constitutional requirements, but that no state may impose on one charged with crime a discrimination in its trial procedure which the Constitution and an Act of Congress both forbid, and the benefits of equal protection may not be withheld merely because of the possibility that the defendant is innocent or guilty.

The case was argued by Mr. Pat Coon and Mr. Spurgeon E. Bell for the State of Texas and submitted by Mr. J. F. McCutcheon for Hill.

State License Taxes—Jurisdiction of Three-Judge District Court

Query v. United States, 86 Adv. Op. 1060; 62 Sup. Ct. Rep. 1122; U. S. Law Week 4434. (No. 619, decided June 1, 1942.)

Certiorari was granted here to review a judgment of the circuit court on the question whether a South Carolina license tax on the privilege of selling tobacco products, playing cards, etc., may be applied to United States Army Post Exchanges in that state. The question was raised by suit to enjoin enforcement of the statute on the ground that since Post Exchanges are instrumentalities of the United States, the imposition of the tax would interfere with the activities of the United States Government, and would be repugnant to the Federal Constitution. This was heard by a three-judge court under § 266 of the Judicial Code, which requires that injunction proceedings to restrain enforcement of state statutes on constitutional grounds be heard only by a three-judge court, with direct appeal to the Supreme Court. The court granted the injunction, but said that it might have been done by one district judge alone.

The opinion by Mr. Justice BLACK holds that if no more than the construction of the statute had been involved, there would have been no necessity for a three-judge court, but it points out that the complainants sought relief on the ground of unconstitutionality, and that the relief awarded was in the opinion predicated in part on that ground. It also observes that since the complainant asserted that the statute did not apply, its sole claim for relief rested on constitutional immunity. It therefore holds that the matter was properly one for a three-judge court under § 266 and it remands the case to the district court for entry of a decree from which timely appeal may be taken.

The case was argued by Mr. Claude K. Wingate for the petitioners and by Mr. Assistant Attorney General Clark for the United States.

ERRATA

In the review of *Overnight Motor Transportation Company v. Missel*, published at page 491 of the July, 1942 issue, strike the last four lines on page 492 and substitute the following: The case was argued by Mr. J. Ninian Beall and Mr. John R. Norris for Transportation Co. and by Mr. George A. Mahone and Mr. William O. Tydings for Missel.

WAR LETTER

JULY, 1942

PUBLISHED MONTHLY BY THE COMMITTEE ON
COORDINATION AND DIRECTION OF WAR EFFORTTHE ORGANIZED BAR MEETS THE CHALLENGE OF WAR
THE FRONT ESTABLISHED FOR TOTAL OFFENSIVE EFFORT

This is the first of a series of monthly letters to be published by the American Bar Association's Committee on Coordination and Direction of War Effort.

As its name implies, the principal function of the committee is to coordinate and focus the total energies and efforts of the Association upon the vital business of waging and winning the war. Another duty of the committee is the carrying out and execution of matters which do not fall within the jurisdiction of other committees. Placed under its authority and direction are all agencies of the Association engaged in activities related to the war. In particular, it is engaged in correlating and directing the activities of its seven Divisional Committees, namely, those on War Work, Civilian Defense, Public Information Program, American Citizenship, Bill of Rights, Improving the Administration of Justice and International and Comparative Law.

AMERICAN BAR ASSOCIATION WAR ACTIVITIES

Current Developments

THE Committee is implementing the mandate given it by the House of Delegates of the American Bar Association on March 2, 1942. This implementation affords a ten-point Association battle line. These points are:

1. Continuation and extension of the services of the organized bar to the men in the armed services and their dependents. This activity will include continued cooperation with the Selective Service System, revising *A Manual of Law for Use by Advisory Boards for Registrants* as occasion requires, legislative representations respecting bills relating to men in the service, and legal assistance to persons dependent upon men in the service, all in cooperation with committees of state and local bar associations dedicated to these tasks and with the governmental authorities.
2. Developing, in the field of civilian defense, measures and procedures for the protection of the lives and properties of civilians. This activity is expected to include issuance of a manual, or series of manuals, respecting the legal duties, responsibilities and rights of persons enrolled in the civilian defense organization, and close cooperation with the Office of Civilian Defense and with State Defense Councils.
3. Collection of data for officials charged with procurement of personnel respecting the services being rendered by lawyers, the skills and capacities valuable to the war effort produced by legal training and practice, and the development of rosters of lawyers available for service in the war effort. Cooperation in this field with the United States Manpower Commission is expected.
4. Conservation of the practice of lawyers serving in the armed forces.
5. Improving the administration of justice with particular reference to the conservation of man hours in court proceedings.
6. Assuring an observance of the provisions of the Bill of Rights and seeking solution of the problems which the war raises in this field.
7. Study of the problems which the war has raised in the field of international law with a view to the eventual development of a post-war program.
8. Maintenance of the standards of legal education and requirements for admission to the bar.
9. Developing public studies and discussions of American history, our institutions, their spirit, our way of life, the issues in the war, and our war and post-war objectives.
10. Strengthening and further developing the person-

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nel organization of the Association's Public Information Program and increasing its availability as an educational medium.

Committee on War Work

The Committee has prepared a second edition of its *A Manual of Law for Use by Advisory Boards for Registrants*. Brought up to date, fully annotated, the second edition will be a valuable handbook for all who deal with the problems of Selective Service and of men in the military service and their dependents. Information as to distribution of the *Manual* will be announced hereafter.

The sub-committee on the Soldiers' and Sailors' Civil Relief Act has actively participated, at the invitation of the House Military Affairs Committee, in the formulation of amendments to the statute. The House Bill, H. R. 7164, has been passed and sent to the Senate. The sub-committee will follow the bill in that body.

In War Series Bulletin No. 2, suggesting a model plan for war work by state and local bar associations, attention was called to the desirability of ascertaining the available legal manpower and the establishment of a central reservoir or pool from which lawyers could be identified and assigned for emergency action. Readers are invited to advise this committee of any achievements which have been attained in such an endeavor. Such information may be passed on through the medium of this letter for the guidance and help of other associations.

Committee on Civilian Defense

With the approval and cooperation of the Office of Civilian Defense, the Committee on Civilian Defense is preparing a handbook for use by the bar and civilian defense officers and agencies. The volume will contain, among other things, the executive declarations of a national emergency, the war powers statutes, the executive orders creating the OCD, the regulations of its director, and Federal statutes and related material upon the numerous subjects which fall within the Civilian Defense program.

Section of International and Comparative Law

The Section of International and Comparative Law is planning and preparing for the peace and its problems. The Section's Committee for that purpose is carrying on intensive studies to enable the bar to take its place at the appropriate time in the planning for a secure peace and the preservation of our basic institutions.

Committee on Improving the Administration of Justice

In the July issue of the AMERICAN BAR ASSOCIATION JOURNAL, there appears an editorial on the subject of preserving manpower in the courts. A simple and effective solution of the problems which exist in this respect in every state, it is pointed out, is the extension

of the use of the pre-trial conference. It may be put into operation without either statute or rule of court and "if properly used, many issues become immaterial and the attendance of witnesses may be dispensed with. Frequently a jury trial is eliminated. Whether a speedy hearing is necessary fully appears in such a conference. Indeed, it is believed that the use of this device will go far towards solving the problem of conserving manpower in the courts during the emergency."

The Committee on Improving the Administration of Justice will be glad to assist by supplying information, or advice as to the establishment and effective use of pre-trial procedures.

Committee on American Citizenship

Inquiries are in progress respecting the extent to which the Association may effectively cooperate with groups interested in stimulating the study of American history at both school and adult levels. This is a movement of growing proportions with which the organized bar may well concern itself, so strong a relation do the developments in the American past have with the administration of justice. There appear to be many unrealized potentials in this field.

Expansion of the Public Information Program

Demands of military service upon many members of the Junior Bar Conference of the ABA have depleted, and threaten further depletion for, the administrative personnel of the Public Information Program, conducted so successfully by the junior members of the Association. The recognized value of this unique organization, however, as a medium for stimulating public discussion and developing public opinion has made clear the desirability not only of maintaining this valuable enterprise but of expanding it. The officers of the Junior Bar Conference and the Director of the Public Information Program have requested the Committee on Coordination and Direction of War Effort to undertake the necessary job of substituting older men for younger men who have been called into the war services, and of developing the number of "local" directors already in the organization. The Public Information Program is expected to act in close cooperation with the OCD and other agencies and organizations. Plans are on foot to make available to speakers appearing under the auspices of the Program, a large and ever-increasing variety of material relating to the war effort, civilian defense, the American way of life, our war objectives, and other topics currently in the public mind.

Section of Legal Education and Admissions to the Bar

With a view to the importance of continued operation of our law schools, and the maintenance of the standards of legal education, the Section of Legal Education and Admissions to the Bar is alert and active. It is striving to prevent the standards of admission to the bar from being unduly lowered; to cooperate with

the approved law schools so that they may keep their doors open; to permit minor relaxation of standards by the law schools after approval first obtained. For information upon these and related problems address the section's Acting Adviser, Mr. Russell N. Sullivan, Page Hall, Ohio State University, Columbus, Ohio.

State and Local Bar Association War Activities

Advances on the Front

The District of Columbia Bar Association has created a Committee on Blackouts. A very scholarly and informative report of the committee, discussing the legal problems arising from blackouts, appears in the May and June issues of that association's Journal. While the report deals with the District's special jurisdictional problems, the research material is of general interest.

The New Jersey State Bar Association Committee on War Work has prepared a series of articles discussing for the lay reader the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940. These articles were syndicated in approximately two hundred New Jersey newspapers over a period of four weeks. Apart from the value of this type of service, both to the public and to the bar, such articles may be very effective means of reminding the public that legal assistance facilities exist, and that the bar is meeting its responsibilities in this field. Copies may be obtained by writing the association at the Trenton Trust Building, Trenton, New Jersey.

The Chicago Bar Association has adopted a very effective means of advising selectees of the existence of legal assistance facilities and their location. It has caused to be printed notices containing the appropriate material which are mailed with each draft board notice, and copies are handed to selectees at the time of induction.

A number of state bar associations, supplementing the work of the organized legal aid bureaus and legal aid facilities set up by the bar, have established very valuable legal "first aid stations" at Army camps and forts. Members of the bar arrange to spend a day, or half a day, at a nearby Army camp or fort, and a regular schedule is maintained, so that men in the service may have available a ready and efficient source of help in dealing with their legal problems.

Opportunities for Lawyers to Share in the War Effort

Suggestions for Individual Action

Lawyers who are competent mathematicians and physicists will find the universities in their vicinity to be very much interested in their services in carrying forward the program of training professional personnel for service in the war effort.

To lawyers interested in military service, attention is called to the developing needs of the Army Specialist Corps. Its objective is to supply all branches of the

Army and other agencies of the War Department with professional, scientific, technical and administrative personnel. Appointments in the Corps will be made only to meet specific needs or vacancies in accordance with request by the Army or other agencies of the War Department. Applications should be submitted to Army Specialist Corps, Washington, D. C. and should contain a brief personal history showing education, age, marital status, draft status, physical condition, experience, salary and any other pertinent information regarding qualifications. Physical qualifications and age are secondary to ability to perform the designated task. Generally persons under 30, unless permanently disqualified for military service, and those between 30 and 45 with 1A or 1B draft classification, will not be appointed in the Specialist Corps, nor will appointment in the Corps itself alter the appointee's liability for military service under the Selective Service Act. It is anticipated that the services of a limited number of lawyers who meet the qualifications will be needed.

The Secretary of the Treasury recently inquired of President Armstrong whether the bar might be enlisted to assist in the financing of the war effort by encouraging the investment of trust and other funds in War Bonds. Mr. Armstrong's reply was an enthusiastic pledge of earnest cooperation by the American Bar Association. Copies of this correspondence have been sent to state and local bar associations, with the suggestions that they give attention to the matter and study the local problems involved. Specific methods of cooperation are suggested by the action of the State Bar of Michigan in investing its available funds in War Bonds, and by the letterhead of the Maryland State Bar Association which bears in bold type, "Every attorney and his clients should invest now in United States War Savings Bonds." The actual accomplishment of this endeavor rests largely in the hands of individual lawyers. By their action and example they can do much to stimulate investments in War Bonds.

The organized bar has participated with the national government and with other organizations in developing programs for the observance of "I Am An American Day" and Flag Day. Attention is now being given to fitting ceremonies for the observance of Labor Day. Through their local bar associations lawyers may have a share in this work which is expected to be carried on in cooperation with State Civilian Defense Councils. Labor Day ceremonies should provide an opportunity to identify a spirit of dedication of all groups to the paramount concerns of the nation and its valiant allies.

Legislative, Executive and Administrative Action

The following bills pending in Congress are pertinent to the war effort of the bar:

S. 2620—Providing benefits for injury, disability and death of civilians by enemy action.

H. R. 6136—Providing for Federal compensation to

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volunteer civilian defense workers injured in performing their duties.

By Proclamation 2561, the President on July 2, denied access to any court to subjects of nations at war with the United States, who enter this country through coastal or boundary defenses and are charged with an attempt or purpose to commit hostile acts.

By executive Order 9125, the President has increased the powers of the Office of Price Administration so that, by delegation of the chairman of the War Production Board, the OPA may institute civil proceedings to enforce any priorities or rationing authority, and intervene in any civil proceedings in which regulations and orders of the Office of Price Administration are or could be relied upon as a ground for relief or defense or are otherwise involved, in any Federal or state court.

The OPA has established a procedure for the adjustment of maximum prices for commodities or services under government contracts. The regulations and forms are designated as Procedural Regulation 6.

RECENT WAR EFFORT PUBLICATIONS OF INTEREST TO THE BAR

- Angell, E., *The Civilian Morale Agency*, Annals American Academy of Political Science, Vol. 220, p. 160, (1942).
Arnold, Thurman, *The Abuse of Patents*, Atlantic Monthly, Vol. 170, No. 1 (July, 1942).
Davies, A. Powell, *American Destiny*, Beacon Press (1942).
Dupey, Col. R. E., *Civilian Defense of the United States*, Farrar & Rinehart (1942).
Hoover, H., and Gibson, H., *The Problems of Lasting Peace*, Doubleday, (1942).
Keeton, G. W., *The Problem of Law Reform After the War*, 58 L. Q. R. 247 (1942).
Note: *Civilian Defense—Some Administrative and Legal Problems*, 55 Harv. L. Rev. 844 (1942).

AMERICAN BAR ASSOCIATION

COMMITTEE ON COORDINATION AND DIRECTION OF WAR EFFORT

Walter P. Armstrong, Chairman
Thomas B. Gay George Maurice Morris

Leonard J. Emmerglick, Executive Assistant
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STATE OF NEW YORK TO MAINTAIN LEGAL EDUCATION STANDARDS

THE New York State Joint Conference on Legal Education has considered the recommendations of the Section of Legal Education and Admissions to the Bar of the American Bar Association, and of the Executive Committee of the Association of American Law Schools for the maintenance of legal education and bar admissions' standards during the war. After discussion, the Conference adopted unanimously the following Resolutions:

"The sacrifices our young men are now making in entering the armed services cause all to wish to reduce the hardships on them. For young men still in law school when called into service, there is a natural desire on the part of the schools and the bar admission authorities to make easier their graduation and their admission to the bar, even at the cost of relaxation of standards achieved after a long struggle.

"Whether such concessions shall be made to these men must, however, be determined in the light of the public interest and of the benefit to the men themselves in the long run. These considerations, we believe, call for substantial adherence to the standards of preparation for and admission to the profession, found advisable in peacetime. Any appreciable relaxation of these standards means that men inadequately trained and tested will be held out to the public after the war as fully qualified to practice law, although their capacity to render legal services to the public will be materially reduced. Moreover, men who are allowed to enter the profession with insufficient preparation and testing will discover their inadequacy in practice, to their own disappointment and bitterness, as well as to the injury of their

clients. It is false generosity to make such deceptive gifts.

"After the war, readjustment will be difficult for many, including those who, prior to entering the Army and Navy, were studying for the bar. The law schools and the bar admission authorities may at that time be of substantial service to these men offering refresher courses or other training appropriate to their needs, and by giving examinations at convenient times, but it is not the part of either wisdom or kindness to sacrifice now the standards of the profession for a supposed benefit to the law students which is wholly illusory.

"First, the scholastic prerequisites qualifying for the privilege of taking bar examinations should not be materially relaxed.

"Second, no rule should be adopted which permits an applicant to be admitted to the bar merely upon producing a law school degree and establishing moral fitness.

"Third, the standards to be met by examinations given should not be lowered or relaxed.

"Fourth, provisions for more frequent examinations or special examinations may properly be made.

"Fifth, the residence requirements may properly be shortened as to men called into service or whose call is imminent.

"Sixth, liberal interpretations of existing rules may fairly be made in justifiable cases of individual hardship, each case to be considered upon its own merits."

PUNISHMENT FOR CRIMINAL OFFENDERS

YOUR Committee appointed to make further study of the indeterminate sentence, the objections of the district judges thereto, and the general subject of punishment for crime, including the treatment of youthful offenders, has given careful consideration to the matters committed to it, in conjunction with the Director of the Administrative Office of the United States Courts and his staff and officials of the Department of Justice and of the Bureau of Prisons. Leland L. Tolman of the Administrative Office has acted as reporter for the Committee, and has assisted it in conducting its studies. A survey of the punitive systems of the several states has been made, the views of United States district judges throughout the country have been sought and tabulated, and meetings have been held in Washington, Chicago, and Philadelphia at which outstanding authorities on the subject of punishment, probation, and parole have appeared and expressed their views. Two subcommittees were appointed to make special studies of the feasibility of the indeterminate sentence in the Federal system and the punishment of youthful offenders by the Federal courts. Your Committee has prepared a bill embodying the recommendations of these subcommittees which is presented herewith.

The Indeterminate Sentence

The indeterminate sentence is an effort to make punishment truly reformatory. Its theory is that one who has been guilty of serious infraction of the criminal laws should be imprisoned for such time as is necessary to cure him of his antisocial tendencies and should then be conditionally released under parole, with adequate supervision, for such time as is necessary to restore him to the normal life of a law-abiding citizen of the community. Since it is impossible to foresee what term of imprisonment and supervision may be necessary to accomplish this result, sentence is not to be for a definite term but for such time as may be necessary to rehabilitate the offender and restore him to his place in society. Release is to be determined by a board which will have expert advice and assistance and will give the prisoner an absolute release only when satisfied that a changed social attitude on his part justifies it. No state of the Union has the completely indeterminate sentence. A system of maximum and minimum sentences prevails, however, in many of the states; and this is administered

in connection with a system of parole, which secures in large measure the benefits which it is argued would flow from the adoption of the indeterminate sentence. We do not think that the public would at this time be willing to accept the completely indeterminate sentence. There is a very definite feeling that there should be some limit set to the imprisonment imposed for crime, and that the judiciary should not be deprived of all control over the matter.

The Existing System

In the Federal system, provision has already been made for parole of prisoners. Under existing law, a prisoner sentenced for a term of more than one year is subject to parole when he has served one-third of his sentence. This permits the release of prisoners under supervision before the expiration of their sentences, where it appears that their antisocial attitude has been changed, and furnishes opportunity for them to be reestablished in society under the protection of the parole authorities, instead of being released without supervision to return to a life of crime when surrounded by their old associates and subjected to the temptations and hardships which their prison experience is reasonably certain to call forth. The defect in the Federal system is the lack of integration of the sentencing and paroling functions and the lack of cooperation between those who sentence offenders and those who parole them. Some sentences are for too long a period; others are so short as not to allow sufficient time for rehabilitation through parole. And, of course, it is impossible at the time of sentence to forecast what the prisoner's reaction to imprisonment will be or when it will be wise to release him under parole. The parole board, on the other hand, acts in very large measure independently of the judges. While recommendations from the sentencing judge are asked, there is no obligation on the part of the board to consider them, and many judges do not think it worth while to make recommendations.

Senate Bill 1638

This Conference at the session of October 1940 gave approval to a bill which was later introduced into the Senate as Senate Bill 1638. This bill is not a true indeterminate sentence law, but contains certain features of such a law, and is modeled on the statute of California. Its distinguishing characteristic is that it provides that all sentences for more than one year shall be for the maximum term, with provision that thereafter a board of sentence and parole shall fix the definite term of imprisonment that the prisoner shall serve. The effect of this, of course, is to take all control over sentences of more than one year out of the hands of the judges and to vest it in the board of sentence and parole. We find that the district judges of the country are strongly op-

Editorial Note—The report of the special committee of federal judges appointed by the Chief Justice to study the existing system of the punishment of criminal offenders. This is part of a public document which may be obtained from Administrative Office of United States Courts.

PUNISHMENT FOR CRIMINAL OFFENDERS

posed to the measure. Of 62 who gave indication of their views in response to the questionnaire sent out by the Committee, 10 were in favor of the law and 52 were opposed to it. The views of these judges, which are entitled to great weight, are to the effect that it is unwise to take the sentencing power in the case of serious crimes entirely out of the hands of the judges and vest it in an administrative board not subject to review or control of any sort.

The merit of the bill heretofore indorsed by the Conference is that it provides a scientific and intelligent approach to the question of sentencing. Under it, sentence is deferred until the prisoner can be thoroughly studied and his reaction to imprisonment ascertained. Opinions of psychiatrists and criminologists, as well as prison officials, are available to the sentencing board; and the board will be the same body that will ultimately have the power of parole with respect to the prisoner. Definite policies in punishment can be carried out on a nation-wide scale and shocking disparities in sentences can be avoided. District judges have pointed out, however, that a weakness of the system is that all judicial control over the matter of punishment, in the case of serious crimes, is removed, and the matter is left to the unreviewable discretion of an administrative board, which will lack many of the features which have given the public confidence in the courts. Integration of the sentencing and paroling functions is attained in the case of serious crimes, but it is attained only by vesting the sentencing power in the parole board and abolishing the power in the courts.

Committee's Proposal

Your Committee has approached the problem committed to it in an endeavor to preserve the sentencing power in the judges and at the same time to secure the benefit of the more scientific method of sentencing which is the object of the act heretofore approved by the Conference. It has drafted an act which sets up in the Department of Justice a Board of Corrections which would have recommendatory power with respect to sentences of more than one year, would exercise the parole function now exercised by the Parole Board, and would, through a distinct subdivision, known as the Youth Authority, control the punishment and rehabilitation of youthful offenders under 24 years of age committed to it by the courts. Provision also is made in the act for the appointment of a chief parole officer to have general supervision of parole throughout the country and for the punishment in farms and prison camps, rather than in state and county jails and prisons, as at present, of offenders on whom terms of imprisonment of less than one year are imposed.

Power to Admit to Probation Unimpaired

With respect to all offenders, the proposed act leaves in the hands of the judge, as it now is, the power to admit to probation, without power on the part of anyone to review the judge's action.

Sentences for More than One Year

The proposed act leaves the matter of sentence in the hands of the judge, without change of existing law, except as to sentences for more than one year. Where the judge is of the opinion that a sentence of more than one year should be imposed, he is required by the act to impose at first a general sentence of imprisonment which shall be for the maximum term prescribed by law; but he is empowered to modify this sentence after he has had opportunity to be advised by the Board of Corrections with regard to it. The act provides that the Board of Corrections, in those cases, shall within six months after the offender begins service of his sentence recommend what in its opinion the definite sentence ought to be, and that the judge shall thereupon fix the definite sentence, which shall be the sentence to be served by the prisoner. The Board shall state its reasons in its recommendation. If the judge disapproves the sentence recommended, he is required to state his reasons, but is not bound by the recommendation and may proceed to fix the definite sentence to be served by the prisoner in accordance with his judgment. If the Board fails to recommend sentence within six months, the judge acts without its recommendation. If he fails to act upon its recommendation within sixty days, the recommendation becomes the sentence.

It will be observed that this provision of the act leaves the sentencing power of the judge unimpaired, but provides that he shall have expert advice in fixing the sentence in the case of serious offenses which, in his opinion, merit a sentence of more than one year. This advice will come from the Board which is charged with the duty of ultimately passing upon the prisoner's parole, and it is believed that the plan proposed will result in a satisfactory integration and coordination of the sentencing and paroling functions. The Board with opportunity to observe the prisoner under confinement, to take account of his reaction to punishment, to study his record, and to have the advice and assistance of experts, will recommend to the court the sentence which in its opinion he should serve. The judge will receive the recommendation and follow it, or decline to follow it, as appears to him to be wise. This means, of course, that ultimate power in the matter of fixing sentence remains with the judge and that the judge reviews the Board and not the Board the judge. This is in accord, not only with the idea that the sentencing power is judicial in character, but also with the concept that administrative agencies should be subject to judicial review to the end that fundamental rights of the individual may not be impaired.

Punishment of Youthful Offenders

With respect to youthful offenders, i.e., those under the age of 24 years, the proposed act leaves to the discretion of the judge whether to admit the offender to probation, to punish him under the ordinary provisions of law or to commit him to the Youth Authority Division

PUNISHMENT FOR CRIMINAL OFFENDERS

of the Board of Corrections for correctional treatment. This means that the power of the judge to admit youthful offenders to probation as under existing law is unimpaired. The power to punish such offenders under the applicable provisions of existing law is likewise unchanged, except that, if the sentence is for more than a year, the provisions for the fixing of sentence explained in the preceding paragraphs must be followed. The act gives to the judge power, however, in his discretion, to sentence the youth to the control of the Youth Authority Division of the Board of Corrections for correctional treatment. If this is done, the youth remains in the custody of the Authority for not more than six years. The Authority may release him conditionally under supervision at any time, and is required so to release him at the end of four years. The Authority is required to classify youthful offenders committed to it, to provide institutions of varying degrees of security in accordance with their needs, to provide separation of youthful from adult offenders, and to provide for the proper separation of youthful offenders. The purpose of this portion of the act is to provide for youthful offenders committed to the Authority the type of correctional treatment which has been found so successful in England in the treatment of youthful offenders, and which is recommended by the American Law Institute. It should be observed, however, that the proposed act makes a number of changes in the model act proposed by the American Law Institute, notably, the period of correction is limited by the act, and the decision of the judge with respect to probation is not subject to review. In the report of the subcommittee will be found a full discussion of the correctional system proposed.

Provision is made in the act for youthful offenders sentenced under the ordinary provisions of law to be transferred to the custody of the Youth Division of the Board of Corrections; but it will be observed that this can be done only on the recommendation of the Board and the order of the judge who imposed the original sentence.

Provision for Chief Parole Officer

Although adequate supervision of parolees is of the utmost importance in the proper working of any punitive system, no provision is made in existing law for parole officers. Supervision of parolees has been carried on by the probation officers under the supervision of a member of the staff of the Bureau of Prisons. It is the view of your Committee that the matter is one of such great importance that provision should be made for the appointment by the Attorney General of a chief parole officer to administer the parole system and to have the supervision of youthful offenders conditionally released in accordance with policies prescribed by the Board. The proposed act so provides.

Prison Camps for Short-Term Offenders

One of the glaring abuses of the present system of punishment is the confinement of short-term offenders

in state and county jails and prisons, where conditions are often unsanitary and where inmates are brought into contact with influences which tend to degrade rather than to improve them. It is universally recognized that the ordinary county jail is a breeder of crime; and it is little short of disgraceful that persons who have committed offenses of such minor character as not to deserve a severe prison sentence should be subjected to their influence. The proposed act provides that the Director of Prisons may designate institutions, camps, or farms of minimum or medium security to which these short-term offenders may be sentenced, and in which they may be kept separate from hardened offenders and employed in such ways as to facilitate their return to society as useful citizens. It is believed that with the availability of existing prison camps and abandoned C. C. C. camps, the cost of such a system of camps for short-term offenders would not be very great; but, whatever the cost, it is the view of your Committee that imprisonment of short-term offenders in county jails must be abandoned and some more humane and intelligent method of punishment for this class of offenders substituted for it.

The Administrative Provisions

For the administration of the system proposed, the act sets up a Board of Corrections of ten members to be appointed by the Attorney General to hold office for six years, with terms staggered. Salaries are to be \$9,000 per year each, except in the case of the chairman, who is to receive \$10,000 per year. Members of the Board to constitute the Youth Authority Division and Division on Adult Corrections are to be designated by the chairman. The chairman is to have power to assign one or more members of either division to sit with the other. One member of each Division shall serve with the Director of Prisons as a Policy Division, which is to have power to lay down treatment and correctional policies in the various penal institutions administered by the Director of Prisons. The present Parole Board is abolished, and its powers are vested in the Board of Corrections created by the act.

Your Committee is of the view that this will provide an integrated and coordinated correctional system. The Division on Adult Corrections will recommend sentences and grant paroles and the Youth Authority Division will administer the youth correction system. Punishment in any case will be in prisons, camps, etc., administered by the Director of Prisons; and correctional policies in the prisons, camps, etc., will be prescribed by the Policy Division composed of the Director of Prisons and a representative of each of the other two Divisions.

Your Committee has made careful inquiry as to whether a board of ten members is sufficient to discharge the duties imposed by the act; and is of the opinion that it is. The Division on Adult Corrections will necessarily deal with paroles as well as with sentences; but in many cases one hearing will suffice for both purposes, for

PUNISHMENT FOR CRIMINAL OFFENDERS

with the recommendation of a sentence of given length, the tentative decision will be made in many cases that parole will be granted after the service of a certain portion thereof, if the prisoner, in the meantime, has been of good behavior. While personal interview is required in every case, this need be by only one member of the Division and action can be taken by a section of the Division.

Your Committee does not think that, aside from the salaries of the additional members of the Board and the chief parole officer, the proposed act will require additional appropriations of any considerable amount. The Federal Government now owns a large number of prisons and camps which will be available for use in carrying out the program which the act envisages. Some additional expense may be required in connection with adequate parole supervision; but this will be comparatively small and is regarded by your Committee as a necessary incident of any proper system of punishment in the federal courts, whether the act be adopted or not.

Act Extending Parole

Your Committee submits as a separate act a proposed statute extending sentence in every case in which a sentence of more than one year is imposed, so that the prisoner shall be on parole in every such case for a period of at least two years after his release. If parole is to accomplish its principal purpose, which is to rehabilitate the offender as a useful member of society, the offender must be subject to supervision for a considerable length of time. The purpose of this statute is to make sure that in each case an adequate period of supervision is provided. This provision has not been incorporated as a part of the principal act because it will require, in the opinion of the Committee, a quite considerable expansion of parole supervision with considerable additional expense.

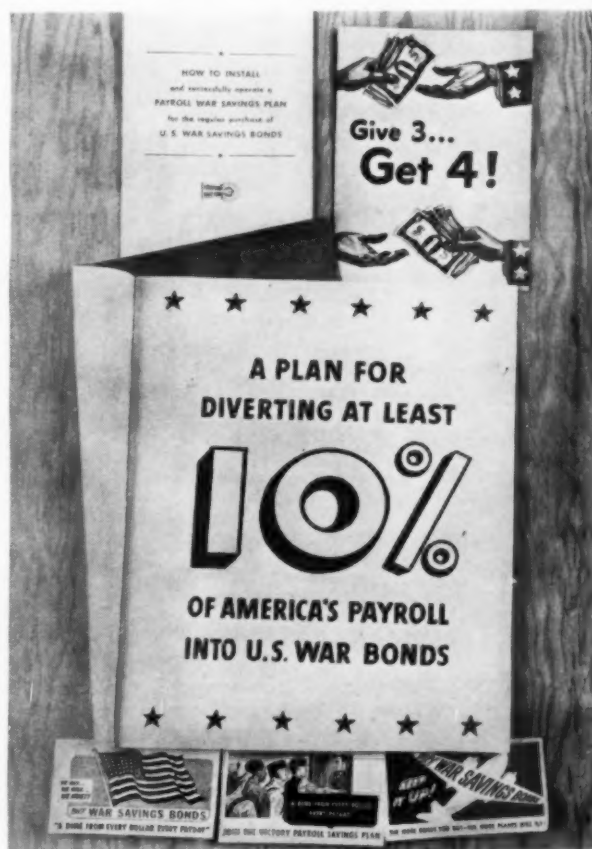
Act Providing for Waiver of Indictment and Jury Trial

Your Committee submits as a separate act a proposed statute providing for the waiver of indictment and jury trial. In many districts intervals of several months elapse between sessions of grand juries. It is very desirable that offenders, particularly youthful offenders, be not held in jail for long periods awaiting the return of indictments. Youthful offenders should not be subjected to the contaminating environments of jails. It is believed that many offenders will be willing to waive indictment and enter a plea of guilty to an information or consent to be tried by the courts. This act makes such a procedure possible. The act may be unnecessary if like provision is incorporated in the new Criminal Rules.

Summary

The recommendations of your Committee with respect to the laws affecting punishment may be summarized as to their most important features as follows:

1. Retain in the trial judge full power to fix the length of all sentences and to admit to probation.
2. Where the sentence, in the opinion of the judge, should be for more than one year, require that a sentence for the maximum term be initially imposed, with power in the judge to modify the sentence later.
3. Provide a Board of Corrections with power to make recommendations to the judges as to sentence in cases where sentence is for more than a year, but with power in the judge to fix the sentence notwithstanding the recommendation of the Board.
4. Provide, in the case of offenders under 24 years of age, that the judge in his discretion, instead of imposing an ordinary sentence of imprisonment on them, may commit them to the custody of the Youth Authority Division of the Board of Corrections for correctional treatment.
5. Provide for the confinement in prison camps, farms, and other institutions of minimum or medium security, instead of in jails and prisons, of offenders on whom short terms of imprisonment are imposed.
6. Provide an adequate period of supervision under parole of not less than two years in all cases where the sentence is for more than one year.
7. Provide for waiver of indictment and jury trial, so that persons accused of crime may not be held in jail needlessly pending trial.



Labor Relations Law

(Continued from page 536)

dictated by a unilateral threat of resort to weapons of physical coercion.

It is not the exclusive interest of the employer or owner that vitalizes the warning of the Italian experience. It is no less the inevitable submergence of the employees' right of free contract than the destruction of the free enterprise of private industry that may be seen in that warning.¹⁴

Democracy in the judicial branch of government can preserve the democratic form only when all parties to the social, economic and political controversy have abandoned the wager of battle and submitted completely to the supremacy of the methods of government by law. Thereby government by law may continue to

14. Note the possibility of peace, unemployment during conversion to peace-time industry, maintenance of wage demands at war scale as advocated by the National Resources Planning Board, refusal or inability of management to respond. . . .

be the expression of group and individual interests reasonably harmonized, the democratic subservience of the state.

Distinguishing between changes in our national labor legislation that are presently desirable and changes that eventually may be found desirable, it is believed that the need of change cannot sensibly be doubted. Thereby the faith of all citizens in the security of democratic government and a fair administration of law may bulwark a united front against every shock.

When peace is attained an enormous back-log of manufacturing and purchasing requirements will offer the possibility of reasonable room for both labor and the institution of private enterprise and economy. Tolerance and faith in the executive, legislative and judicial branches of government and a survival of a free private enterprise then can cope with the burdens of a taxation however staggering, a public debt however astronomical its figures, and the problems of economic reconstruction however difficult they may be.

"It is still true that in all the great movements in this country the lawyer is one of the leading forces in the community. . . . Let us so shape our conduct as to continue this influence, to maintain the high standard of a great and noble profession, and let new nationalism be demonstrated to be a wise and lasting doctrine of modern progressive civilization."

Frank B. Kellogg

President
American Bar Association
1912-13

Application for Membership
AMERICAN BAR ASSOCIATION
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Bar Associations to which applicant belongs _____

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NAME _____

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*Check to the order of American Bar Association for \$ _____ is attached.

*\$4.00 if applicant has been admitted to the bar less than five years; \$8.00 if admitted more than five years.

BOOK REVIEWS

A Century at the Bar of the Supreme Court of the United States, by Charles Henry Butler, formerly the Court's Official Reporter. 1942. New York: G. P. Putnam's Sons. 214 pp. plus index. Illustrated.—The earlier chapters tell of two ancestors of the author, both eminent members of the New York Bar, who participated in much important litigation in the federal Supreme Court. Of these, Benjamin F. Butler (no kin to him of the Civil War) was prominent in politics, as well as in the law. For five years he served as Attorney General, under President Jackson, and in that capacity represented the Government in many cases. William Allen Butler, the author's father, eschewed politics and devoted a long life to the practice of his profession. When he appeared in the Supreme Court, as he frequently did, and in matters of large concern, it was as counsel for private clients. Charles Henry's pride in these forbears is entirely justified; for, by their characters, and by their achievements at the bar and in broader fields, they earned high places on the Roll of Honor. See *Dictionary of American Biography*.

For lawyer and layman alike, the main interest of the book lies in its contributions to our knowledge of the "human side" of the Court, as seen by an interested observer from a box seat.

Mr. Butler was admitted to the bar of the Court in 1886; but his first big business with the Court came in February, 1890, when a gigantic banquet in New York climaxed the celebration of the Court's Centennial. There he bore the heavy burden of supervising the menu and the seating of the guests—840 in number—among whom were Chief Justice Fuller "and all his men"; an ex-Associate Justice; and many another eminent judge and leader of the Bar. The book actually provides, among numerous other illustrations, a copy of the seating diagram, with the name and number of each trencherman.

In December of 1902, Mr. Butler became the Court's Reporter. He fulfilled the duties of that office until the fall of 1916, when his resignation went into effect; and thereafter he remained in Washington, practicing law until he fell ill, in February of 1940, and a few days later died. As Reporter he attended the Monday sessions of the Court to hear the delivery of opinions, and many other sessions, listening to arguments of counsel; and, when he had ceased to be Reporter, his interest in the Court and its proceedings did not flag and he continued to be a regular attendant on opinion days. Throughout this long period came many opportunities to observe the Court in action, and the actors before the Court, and to gain acquaintance with individual Justices. And such opportunities were extended by social relations at the Capital, where Mr. Butler and

his gracious wife dispensed and received generous hospitality and touched elbows with many Personages.

The book therefore abounds in reminiscences of courtroom occurrences—some of them quite funny—and of the traits and sayings of particular Justices. We are told of courtroom etiquette; of formal dress requirements that gradually have yielded to the impacts of a simpler and a better life; of stately calls upon the President on the opening day of each Term; of funerals, etc., etc.

The style is clear and pleasing; and, wherever permissible, the story is enlivened by a good sense of humor.

Withal, due to its writer's pride in and enthusiasm for his dual subject—ancestral and judicial—*A Century at the Bar of the Supreme Court of the United States* has a distinct charm of reminiscence and a naïve personal touch not to be expected from such a title.

ERNEST KNAEBEL

Washington, D. C.

My Philosophy of Law: Credos of Sixteen American Scholars. Published under the direction of the Julius Rosenthal Foundation, Northwestern University. Pp. 320. Boston Law Book Company.—Is there a philosophy of law, or are there several, or even many, such philosophies? Bertrand Russell has said that no two philosophers have ever understood each other, but this discouraging statement apparently does not apply to the philosophy of law. And for this fact we may well be grateful. There is more agreement than disagreement among the contributors.

In the unique volume under notice two professional (and professorial) philosophers, John Dewey and Morris R. Cohen, and fourteen deans or professors of leading law schools expound briefly their respective philosophies of law. The most eminent of these are Roscoe Pound, John H. Wigmore, Thomas Reed Powell and K. N. Llewellyn. The bench is not represented by a single contributor. Neither is Congress or the Cabinet.

It is of course impossible to do justice to this symposium in the space available in these pages. Suffice it to say that the discussion will be found stimulating and thought-provoking, and that many utterances are striking and memorable. Certain trends are clearly indicated, and they are gratifying and full of promise. Few would take exception to Professor Dewey's demand that "intelligence be used to investigate, in terms of the context of actual situations, the consequences of legal rules and of proposed legal decisions and acts of legislation." The ideas of jurists of the type of Brandeis, Holmes and Cardozo are now so generally accepted that it is hard to believe that they were ever seriously opposed or questioned. Much reform and protective legis-

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lation is avowedly based on actual social and industrial situations, not on dogmas or traditions.

The aim of the law is justice, and every legal system does embody *some* element of justice. Justice is essential to order and reasonable social harmony, but the conception of justice evolves as our knowledge grows and good-will conquers greed, meanness, selfishness and malice. Democracy spells more justice than oligarchy or autocracy or plutocracy, but even in democracies interests and wills often conflict, and we have pressure groups and special legislation. In interpretation of law, judges, being human, often read class or group interests into statutes or precedents. There is no such thing as "a government of laws," since men make laws, construe laws, and enforce laws. Moral progress there has been, however, and law cannot long lag behind ethics.

To get rid of absolutism, to face facts and make every effort to establish and maintain genuine justice in all our relations and affairs, is to repeal, reverse, and change many old laws and judicial decisions. This is exactly what we have been doing in the United States. In the words of Vice President Wallace, "the common man is on the march." Gross inequality, unfair privilege, exploitation and trickery in business must go. The philosophy of law cannot be at variance with the philosophy of democracy, human brotherhood, and human progress. Legal science and legal philosophy cannot ignore the teachings of economics, psychology, history, ethics, and anthropology, any more than they can scorn the verdicts of common sense and general experience. In the words of Holmes, quoted by Professor Cohen, "the life of the law has not been logic; it has been experience."

It may not be impertinent to suggest that the symposium under notice—good as it is—might be followed up by the Julius Rosenthal Foundation by another one, the contributors to be eminent thinkers closely associated with practical lawmaking, law interpretation and law administration.

Chicago, Illinois

VICTOR YARROS

RECENT PUBLICATIONS RECEIVED

- ADMINISTRATIVE REGULATION: A STUDY IN REPRESENTATION OF INTERESTS, by Avery Leiserson. 1942. University of Chicago Press. Pp. XIII, 292. \$3.00.
- THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES, by Joseph P. Chamberlain, Noel T. Dowling and Paul R. Hays. 1942. New York: Commonwealth Fund. Pp. XII, 258. \$3.00.
- THE UNITED NATIONS: WHAT THEY ARE, WHAT THEY MAY BECOME, by Henri Bonnet. 1942. Chicago: World Citizens Association. Pp. VII, 100. 25 cents.
- THE COPYRIGHT LAW: An analysis of the Law of the United States governing registration and protection of copyright works, including prints and labels, by Herbert A. Howell. 1942. Washington, D. C.: Bureau of National Affairs. Pp. VIII, 279.
- THE NEW BELIEF IN THE COMMON MAN, by Carl J. Friedrich. 1942. Boston: Little, Brown & Co. Pp. XII, 345. \$3.00.
- LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT, by Benjamin R. Twiss; foreword by Edward S. Corwin. 1942. Princeton University Press. Pp. XII, 271. \$2.50.
- NEW YORK LAWS AFFECTING BUSINESS CORPORATIONS, ANNOTATED. Revised to May 24, 1942. 23d ed. 1942. New York: United States Corporation Co. Pp. XXXII, 579. \$2.00.
- LANDLORD AND TENANT (REQUISITIONED LAND) ACT. 1942. H. M. Stationery Office. Pp. 14. 3d.
- PUBLIC POLICY: A YEARBOOK OF THE GRADUATE SCHOOL OF PUBLIC ADMINISTRATION, Harvard University, 1942, edited by Carl J. Friedrich and Edward S. Mason, associate editor. Published by the School. Pp. VII, 275. \$3.00.
- OCCUPATIONAL TUMORS AND ALLIED DISEASES, by W. C. Hueper, M. D. 1942. Springfield, Ill., and Baltimore, Md.: Charles C. Thomas. Pp. XXVIII, 896. \$8.00.

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By KENNETH C. SEARS

Professor of Law, University of Chicago

Administrative Law

The Doctrine of Res Judicata in Administrative Law, by Ernest H. Schopflocher, in 1942 Wisconsin L. Rev. 5, 198 (January, March, 1942.)

Res judicata in administrative law is an interesting and important subject-matter. Mr. Schopflocher has covered many cases in distinguishing *res judicata* from problems of judicial review and continuing jurisdiction and in considering the validity of the administrative decision when it is objected that the administrator lacked jurisdiction. Then appears the question, "What are the tests of whether a prior administrative decision is *res judicata*?" The author's "simple answer . . . is that the legitimate intention of the legislature controls the extent to which *res judicata* effects attach to administrative decisions." He repudiates what he calls the

"analytical approach," whereby if a court is willing to attach *res judicata* effects it will call the action of the administrator judicial or quasi-judicial. But if a court is willing to permit relitigation of an administrative decision it will call the decision administrative, legislative, or executive. This process of rationalization is deplored. The author used seventy-six pages to prove his thesis but a doubt should be expressed whether his test is really significant. Will a master of this test be able to predict with reasonable certainty what the courts and administrative tribunals will do in the future? Whatever answer may be given to this question, one may readily agree with the author on two points: (1) "Neither the question of continuing jurisdiction, nor the distinction between collateral and review proceedings, nor the question of exclusive jurisdiction, nor that of *res judi-*

data can be solved by a consideration of the nature of the administrative action"; (2) It is very important that in drafting statutes in the future, they "should make concise provisions as to whether and to what extent the jurisdiction of the administrative agency is intended to be exclusive of that of the courts, and whether and to what extent administrative determination of ultimate or incidental issues is intended to preclude repeated litigation." In the meantime it is feared by this commentator that the doctrine of *res judicata* in administrative law will remain in its presently confused status for a long time to come.

Biography

The Public Papers and Addresses of Franklin D. Roosevelt, by Harold J. Laski, in 9 *The University of Chicago L. Rev.* 379. (April, 1942.)

Harold Laski has an attractive style. He found the second installment of the Roosevelt papers "full of fascination" but not a full presentation "of the forces in play behind the scenes." More than a book review, it is a partial analysis of Mr. Roosevelt and also a brief comparison of Roosevelt and Churchill. It will not be pleasant reading to those who gather around the festive boards, loaded with fine food and strong drink, and vent their spleen upon that "awful man Roosevelt." For, in the opinion of Laski, Mr. Roosevelt is "a very great President." That characterization is not bestowed lightly. He is great because he is wise, a quality that Calvin Coolidge and Herbert Hoover lacked even though they had formal education; that Madison and John Quincy Adams lacked even though they had natural intellectual capacity; and that Cleveland and Theodore Roosevelt lacked even though they had plenty of character. As far as the particular volume is concerned, Roosevelt is convicted of only two false moves. (1) He was wrong in his Court plan, "not as to the end he sought, but as to the methods by which he sought to attain it." (2) The attempted congressional purge of 1938 was a mistake in policy even though the temptation is obvious: "the men whom Mr. Roosevelt attacked used membership of the party he led to stab him in the back."

Conflict of Laws

Developments in the Conflict of Laws, 1902-1942, by Ernest G. Lorenzen, in 40 *Michigan L. Rev.* 781. (April, 1942.)

This interesting review of the developments of forty years in a complicated and confused field of law gives one a good bird's-eye view of a large subject. A summary cannot easily be made of what in itself is essentially a summary of (1) developments in the United States and (2) developments in other countries. The little revolutions that have occurred in this field remind one of the better known revolutions that have occurred in American constitutional law, and all of them may

well be connected with our world-wide chaos. Professor Lorenzen leaves one in doubt whether he thinks that the Restatement of Conflicts by the American Law Institute has been a notable achievement. At the outset he says that: "In this Restatement we have the most detailed collection of rules of the conflict of laws to be found in any country." But as to quality there are three or four fairly strong criticisms. From a world point of view progress has been made and it is not unlikely "that before many years there will exist three large groups of countries in which the rules of the conflict of laws have attained substantial uniformity—the Continental, the Latin-American and the Anglo-American."

Criminal Procedure

The New Federal Criminal Rules, by Arthur T. Vanderbilt, Jerome Hall, Osmond K. Fraenkel, and Pendleton Howard, in 51 *The Yale Law Jour.* 719. (March, 1942.)

The boys at Yale apparently decided to scoop their competitors by writing about the new federal criminal rules of procedure before they had been adopted. But Mr. Vanderbilt, the chairman of the advisory committee on the rules, conferred his cautious blessing with a foreword that the committee "are now considering the third tentative draft." They have been impressed with "the enormous number of legal barnacles that encrust the subject of criminal procedure." We are promised that the new rules will expedite prompt and efficient trials and yet preserve the individual's civil liberties. Nothing wrong with that program. Professor Jerome Hall then follows with a historical and philosophical study of the Objectives of Federal Criminal Procedural Revision. The point of view, it seems, is relatively conservative and it is based on a premise of the inescapable dilemma of criminal procedure. "The dilemma consists in the fact that the easier it is made to prove guilt, the more difficult does it become to establish innocence." That is a rather discouraging generalization. Is it necessarily true? Assume a reformation of the rules of evidence with a view to securing the truth as far as practicable. Why will they not aid both in establishing guilt, if a man is guilty, and innocence, if a man is innocent? Are we not bound to seek out and eliminate rules which cannot be justified on a rational basis but which, as they stand, may result or aid in an acquittal or conviction without regard to the ultimate truth? Lawyer-author Fraenkel contributed specific ideas on a number of real problems. They may be helpful to the committee or cause it to consider rules concerning wire-tapping, dictographs, detectaphones, searches and seizures, admissions, arrest, the third-degree, and removal proceedings. Professor Pendleton Howard submitted an admirable review of the subject of Evidence in Federal Criminal Trials. It is shocking to one's confidence in the long-run ability of our Supreme Court to observe how it fumbled this relatively simple subject from

United States v. Reid in 1851 to *Funk v. United States* in 1933. Now that the latter decision seems to have settled the long debate whether the rules of evidence in criminal cases in the federal courts should adhere to the principle of conformity or uniformity, in favor of uniformity, hope is expressed that eventually we shall have, through rule-making, a separate complete federal code of evidence for use in both criminal and civil cases. Meantime we shall have to endure, until changed, fumbling Rule 43(a) of the Federal Rules of Civil Procedure. Also it is feasible to have, in the nature of a stop-gap, a limited amount of codification of the rules applicable in criminal trials in the forthcoming Rules of Criminal Procedure. None of the writers except Mr. Vanderbilt indicated that he had examined the last tentative draft of the rules.

Government

The Bar as a Governing Caste, by Herschel H. Rose, in 48 West Virginia L. Qu. 87. (February, 1942).

Recently, Judge Rose of the West Virginia Supreme Court of Appeals made an interesting address. Who have been the rulers of our nation? At least "it cannot be denied that men of the legal profession have from the beginning occupied positions of power and honor far beyond that to which their numbers alone would entitle them." But now it is clear that lawyers are in a political decline and that this is not a mere temporary phase of our national life. Why? (1) Government by law has come under a cloud. International law collapsed and the public were shocked to find that the Constitution of the United States was not a perfect document. (2) There have arisen in the world new philosophies of government, communism and facism, and we are no longer an Anglo-Saxon people. However, it is thought to be a good thing that lawyer domination has been stopped. It is desirable to have a more diversified representation in the councils of government.

Freedom of Utterance

From Seditious Libel to Freedom of the Press, by Bernard L. Shientag, in 11 Brooklyn L. Rev. 125. (April, 1942).

One hundred and fifty years ago Fox's Libel Act was passed in England. Curiously, the greatest, perhaps, of the English judges, Mansfield, by applying the law just as he found it, in this particular, caused criticism that hastened the passage of the Act. The history of the struggle is traced. First, the press was the prerogative of the King and this idea sustained a restrictive licensing system, which was followed by a general licensing system under the direction of the Star Chamber. After

that body ceased to exist, licensing was continued until 1694. Then the main struggle was to change the law which made the question, whether the writing was libellous, one for the decision of the court rather than for the jury. This was accomplished as to criminal libel by Fox's Libel Act in 1792. In 1843, Lord Campbell's Act provided that on a criminal prosecution for a defamatory libel, defendant was entitled to plead the truth and that the publication was for the public benefit. In this country a similar struggle occurred. Peter Zenger was acquitted in 1735 by a New York jury which insisted upon its right to return a general verdict. In 1798 the Alien and Sedition Laws were passed and the reaction was exceedingly hostile even though truth was a defense and the jury was to determine the criminality as in other criminal cases. *People v. Croswell* in 1804 resulted in an equally divided court on the same two questions. Then came statutory and constitutional protections. As a result, freedom of utterance is now so nearly complete that a question arises whether we can properly control agitators who proceed to public places and incite religious and racial hatreds.

Labor Law

Reinstatement and Back Pay—The Phelps Dodge Case, by Milton H. Feinberg, in 42 Columbia L. Rev. 443. (March, 1942.)

The decision of the majority of the Supreme Court that the Labor Board correctly ordered the instatement, rather than the reinstatement, of two former employees, who had ceased to be employees before the strike in question occurred, is defended. Then attention is focused on another holding that the employees, who had obtained substantial equivalent employment elsewhere after the strike, were entitled to reinstatement if the Board was of the opinion that such action "will effectuate the policy" of the act. The idea that the Supreme Court had in mind was that the Board should exercise its discretion on each case of this sort. The reaction of the Board to this ruling, however, has been, apparently, to make this right of reinstatement a rule of thumb, not a matter of individual discretion. The author, apparently but not very clearly, disagrees with a third ruling of the court, viz., requiring deductions from back pay awards of sums which the employees have failed without excuse to earn. Finally, it is a fair inference that the Supreme Court in the *Phelps Dodge* case also decided that the Labor Board may award back pay to an employee regardless of whether it directs his reinstatement. This concludes a good discussion of fourteen pages—a brief leading article for a prominent law review. Here is a hope for more of its kind and less of the type that reminds one of the song: "A rambling wreck from Georgia Tech . . ."

WAR NOTES

By TAPPAN GREGORY

Of the Chicago Bar

WORD comes from Washington that the publication of the new edition of *A Manual of Law* by Selective Service has been delayed because of legislation creating several positive categories limiting the order of calls for induction under Selective Service. They do not control classification of registrants, yet they do require the promulgation of new regulations, and the completion of the *Manual* must await the receipt of these regulations. Before the new law took effect, Colonel Beckwith, Chairman of the Committee on War Work, had already completed a review of the *Manual* in page proof and the preparation of a complete index. The whole project has been carried forward under his direction and largely by his personal effort. We are assured that Selective Service is anxious to complete the work as soon as possible and that it is reasonable to hope that the finished product may be in our hands within the next two or three weeks.

Another invaluable manual is in course of preparation under the auspices of the new Committee on Civilian Defense, of which Philip J. Wickser is chairman. The subjects covered under the head of Civilian Defense are manifold, far-reaching and of vital importance in the war effort.

All war activities of the American Bar Association are now supervised by the Committee on Coordination and Direction of War Effort, consisting of Walter P. Armstrong, Chairman, George M. Morris and Thomas B. Gay.

Lieutenant Oscar Fendler of the Navy, stationed at Corpus Christi, writes that he has completed a draft of a pamphlet giving the answers to legal questions of importance to those in service, wherever stationed. He is prepared to submit this work for review by the Committee on War Work.

Last May a sub-committee of the Committee on War Work, on the

Soldiers' and Sailors' Civil Relief Act, considered H.R. 7029, a bill to amend that act, then pending before the House Committee on Military Affairs, and submitted a number of suggestions. Most of these were adopted and incorporated in a new draft of the bill which went to the House as H.R. 7164. This bill was passed by the House on June 18 and is now pending before a sub-committee of the Military Affairs Committee of the Senate. There are still some changes which our sub-committee believes desirable and these are the subject of a report just completed. If this report is approved by the main committee it will be brought to the attention of the Senate committee.

In New York City a very important step has been taken in the organization of the Bar for maximum service in war work. There a committee of seventy-five has been constituted of representatives of every organization of lawyers in the city. This new committee is autonomous. Its members are authorized to act independently of the constituent groups represented. Its executive committee meets periodically at frequent intervals and its sub-committees are all active and busy. It is very desirable that this pattern be followed throughout the country.

At Purdue University, the War Department Civilian Defense School for the middle west opened its first course on June 14. Local defense councils were invited to send representatives subject to the limitation that the total enrollment shall not exceed fifty. Additional courses will be given in succeeding months, each for a period of about two weeks.

The American Municipal Association reports that the Attorney General of California has announced an opinion holding that the owners of buildings used as public air raid shelters are not responsible for injuries to the public although they must give warning of any known

dangers on their property. The opinion also holds that while cities and local defense councils must select suitable shelters, beyond that they have no liability for injuries received in the shelters.

A news dispatch from Gettysburg tells of the case of a man of draft age indicted for selling liquor to minors. He pleaded guilty. He was admitted to bail and while out on bond awaiting sentence, was called for induction into military service. Before actual induction, he was called before the court to be sentenced. As a result of the hearing, the conclusion was reached that he was of such low moral and intellectual character as to be unfit for military service. Accordingly the man was sentenced by the court, the draft officials acquiescing.

In the Third Circuit, the Court of Appeals recently passed upon the case of several of Jehovah's Witnesses. They had claimed before their local draft board that they should be classified as ministers. The board ruled them conscientious objectors. Their request for reclassification was refused and the decision of the local board was affirmed by the appeal board. These registrants refused to respond to induction notices and for that were indicted. The lower court excluded testimony offered by the defendants to prove that the local board had placed them in the wrong classification. The Court of Appeals affirmed.

Representative Kennedy of New York has introduced a bill to authorize civilian defense workers to purchase at low rates through the War Damage Corporation, insurance against death or personal injury.

It is now possible to obtain from the Superintendent of Documents the OEM Handbook telling of the functions of the different war agencies within the OEM.

And the Iroquois Confederacy has moved to declare war on the Axis!

THE FOURTH CIRCUIT JUDICIAL CONFERENCE

IN spite of the war, and the competition of other activities for the time and attention of both lawyers and judges, the Twelfth Annual Judicial Conference of the Fourth Circuit, held at Asheville, North Carolina, on June 18, 19 and 20 brought out a large attendance of both groups. With the Chief Justice of the United States presiding and speaking at the first session, Governor O'Connor of Maryland as the principal speaker at the dinner and Attorney General Biddle on the program Saturday morning, the sessions were unusually attractive and instructive.

In accordance with custom, a preliminary session of the judges was held on the day before the public sessions. The first public session on Friday morning was opened with the calling of the roll by Claude M. Dean, Clerk of the Fourth Circuit Court of Appeals. In addition to the judges, at least 70 lawyers were present as delegates under the circuit rule which provides that members of the Conference from the bar shall be composed of the presidents of the five state bar associations in the circuit and five delegates to be appointed by each, the United States attorneys and state attorneys general in the circuit, members of the local rules committees appointed by the district judges, delegates appointed by the circuit judges, and the representatives of approved law schools.

Senior Circuit Judge John J. Parker first introduced the Chief Justice, whose interesting address on the work of the Supreme Court was enthusiastically acclaimed. (The remarks of the Chief Justice will be found in this issue on page 519.) Judge Orie L. Phillips, Senior Circuit Judge of the Tenth Circuit, was the next speaker and his address dealt with the punishment of youthful offenders, a subject

covered by a part of the report of the Committee on Punishment for Crime appointed by the Chief Justice upon authorization of the Judicial Conference. As chairman of the subcommittee which made a special study of this phase of the subject, he summarized the extensive work which the committee had done and presented its conclusions as to methods of handling offenders under the age of 24. The final address of the morning session by Col. Archibald King of the Judge Advocate General's Department gave a very clear picture of the modernized court-martial procedure of the army.

The afternoon session at the Grove Park Inn, where the members of the Conference were staying, was inaugurated by the reading of a memorial to the late Judge Alva M. Lumpkin of South Carolina by Claud N. Sapp, United States Attorney from Charleston. Then the Conference heard a discussion of the proposals of the Committee on Punishment for Crime by Judge Bolitha J. Laws of Washington, D. C., a member of that committee. He discussed the manner in which the plan was designed to work and stressed the fact that the final sentence was left in the hands of the district judge, who would have the assistance of the information, investigation and recommendations of the board of corrections, acquired after the convicted defendant has been studied during the first months of his incarceration.

The subject has always been controversial and strong opinions were expressed on both sides of the question.

The banquet on Friday night was a delightful affair. Judge Parker introduced the speakers. The Chief Justice responded briefly and was followed by Governor J. M. Broughton of North Carolina who extended brief greetings and welcome. Follow-

ing him the two recently appointed South Carolina judges in the Circuit, Judge J. Waties Waring of Charleston and Judge George Bell Timmerman of Columbia, spoke.

Governor Herbert R. O'Connor of Maryland, the principal speaker of the evening made an eloquent address, stressing the need for maintaining a free and independent judiciary at all costs. The final speakers on the program were Claud N. Sapp of Columbia, South Carolina, and Holman Willis of Roanoke, Virginia. They both proved to be raconteurs of rare ability.

The final session Saturday morning was featured by an address by Attorney General Francis Biddle. Mr. Biddle struck a hopeful note by saying that the time would come when the enemy would crack, mentally and physically, and that as far as production is concerned we are "over the hump" and the major factors in the war program are now transportation and raw materials. His talk dealt mainly with the control of aliens and with methods of foreign propaganda. He termed the fact that there had been no concentrated domestic sabotage on a wide scale as evidence that the system of handling aliens is working well. He pointed out the difficulty of distinguishing between subversive propaganda and honest criticism, and laid down the tests used for determining the former.

Regarding the function of the lawyer in these times, he said:

"Lawyers ask what they can do in the war effort. It is your duty to sustain and lead public opinion."

The formal program ended with an able speech by Alexander Holtzoff, Special Assistant to the Attorney General, and secretary to the advisory committee of the Supreme Court on the federal rules of criminal procedure, on the work of that committee.

W. S.

JUNIOR BAR NOTES

By JAMES P. ECONOMOS

Secretary, Junior Bar Conference

NATIONAL chairman, Philip H. Lewis, approaching the end of his administration, delivers this message to the younger American Bar:

"For the first time, the Junior Bar Conference will convene its annual meeting while the nation is at war. Never has it been more important for us to weigh carefully the past and present activity in order that we may chart wisely the course to be followed during the coming year.

"We will find that a substantial number of our active membership is in the military service. This imposes an additional obligation on those remaining to maintain and preserve the high ideals we have followed of unselfish service to the public and to the legal profession. We must all cooperate and promote the new program to be adopted at Detroit on August 23, 24 and 25."

Final plans for the ninth annual meeting of the Conference have been completed. The Program Committee under the leadership of Earl F. Morris, Columbus, Ohio, has performed its task under unusual circumstances. Valuable assistance has been received from the Local Arrangements Committee which is headed by Malcolm L. Denise, Detroit.

An advance program will be mailed to all members of the conference. This contains full information as to the events that will take place in Detroit.

An outstanding feature of this meeting will be the participation of the Junior Bar Section of the Canadian Bar Association in the business and social activities of the Conference. Benjamin R. Guss, St. John, New Brunswick, president of the group, will speak at the general business session on Sunday afternoon, August 23. The younger Canadian lawyers will hold their annual meeting at Windsor on Tuesday, August

25. This is the first time that the younger lawyers of the two countries have had an opportunity to exchange views and ideas. Many will recall the interesting representative of the Canadian Juniors, R. D. Guy, who spoke at last year's session in Indianapolis.

Chairman Lewis has appointed Raphael J. Moses, Alamosa, Colorado, Chairman of the Rules Committee; Harold B. Wahl, Jacksonville, Florida, Chairman of the Elections Committee; and Herzel H. E. Plaine, Chairman of the Resolutions Committee.

The chairmanship of the newly created Committee on Legal Assistance to the Armed Forces has been bestowed upon Park Street, San Antonio, Texas. It is expected that a preliminary report will be ready for the Detroit meeting.

The reports received from State Chairmen, State Directors and Local Directors indicate that considerable energy has been expended in the Public Information Program. National Director Willett N. Gorham indicates that the total may surpass the achievements of the prior year. An outstanding development has been the cooperation received in many localities from the state and local bar associations, both senior and junior.

David Kreidler, Philadelphia, Pa., Chairman of the Committee on Re-statement of Law, announces the completion of the Oregon annotation on Volume 3 of Torts by Paul L. Weiden, Portland. Several other annotations are nearing completion in Maryland, New Hampshire and Virginia.

The Procedural Reform Studies are now under the direction of Albert E. Jenner, Jr., of Chicago. He succeeds National Director Paul B. De Witt, who has received a com-

mission in the United States Naval Reserve.

The third issue of the *Junior Bar News Bulletin* has been mailed by the Committee on Cooperation with Junior Bar Groups. It announces the awards of merit to be given annually to the outstanding state and local junior bar organizations. It is planned to give four awards, two to state junior bar groups and two to local junior bar groups.

State Chairmen Everett E. Palmer, Williston, North Dakota, and Thomas Stanton, San Francisco, California, are in the Army. Gunther R. Detert, San Francisco, has been appointed to the California position. Associate Director of Public Information Program, H. Bartley Arnold, Columbus, Ohio, is now in the Navy. Elwood Hettrick, Boston, a member of the Committee on Relation with Law Students, has been appointed Dean of the Boston University Law School. Fred Parks, Houston, has been elected President of the State Junior Bar of Texas to succeed Fred Korth of Fort Worth.

The Junior Bar Section of the Detroit Bar Association has been approved by the Executive Council as an affiliated unit of the Junior Bar Conference. Rowe A. Balmer is chairman and Robert E. Bratton serves as secretary. It is expected that applications for affiliation will be received from many other Junior Bar sections and groups.

The Junior Bar Section of the State Bar of Michigan has completed negotiations with an insurance company, whereby it is able to offer to its members a \$5,000 policy of life insurance at a special half rate charge for the first three years. James S. Miner, Owosso, chairman, reports an enthusiastic response on the part of the Section. This is an excellent example of the kind of service a junior bar group can render to its membership.

BAR ASSOCIATION NEWS

Delaware State Bar Association

THE annual meeting of the Delaware State Bar Association was held on Friday, June 26, 1942. In



WILLIAM S. POTTER, President
Delaware State Bar Association

view of the times, the meeting was in the form of the customary luncheon meetings held every month and the only address was that of the retiring president, James R. Morford.

The new officers elected are as follows: William S. Potter, President; Robert G. Houston, 1st Vice President; George M. Fisher, Jr., 2nd Vice President; George C. Hering, Jr., 3rd Vice President; William Marvel, Secretary; Thomas C. Frame, Treasurer; William Poole, Delaware State Bar Association Delegate to the American Bar Association.

A new by-law was adopted at the meeting creating a Committee on Junior Bar Activities. The retiring president made a strong plea for increased bar association activity and received a unanimous vote of thanks from the Association for his work during the past two years in reviving interest in the State Bar Association.

The new president, Mr. Potter, promised to continue the work so ably undertaken by the retiring president.

WILLIAM MARVEL,
Secretary.

Georgia Bar Association

THE fifty-ninth annual meeting of Georgia Bar Association was held at Atlanta, Georgia, on May 21-22-23, 1942.

On the morning of the first day of the session Honorable Frank D. Foley of Columbus, President of the association, delivered the President's annual address.

On the afternoon of the first day a general discussion was held among the members of the association. The first question discussed was "How Can the Georgia Lawyer as an Individual Most Effectively Help in the Present National Emergency, and How Can the Georgia Bar Association Most Effectively Help in Such Emergency?"



JOHN B. HARRIS, President
Georgia Bar Association

On Friday morning S. R. Prince, of Washington, D. C., delivered an address on the subject of "Some Phases of the Practice of Law in War Times." This address was followed by short talks made by former mem-

bers of the legal profession who are not now engaged in active practice. On Friday afternoon the annual address of the association was delivered by Major General Stephen O. Fuqua, United States Army, Retired, now Military Affairs Editor of *Newsweek*, on the subject of "Progress in Military Art."

The annual banquet was held Friday night at the Atlanta Biltmore Hotel with Mr. Marion Smith of Atlanta acting as toastmaster. Honorable Charles Fahy, Solicitor General of the United States, was the principal speaker.

On the last day of the session Major R. F. Scarborough, Judge Advocate General's Department and Staff Judge Advocate at Camp Wheeler, Georgia, delivered a paper on the subject of "The Administration of Military Justice." Mr. Edward E. Dorsey, Jr., representative of the Junior Bar Membership and member of the Law School of Mercer University, spoke on the subject of "The Young Lawyer after the War."

The following officers were elected for the year 1942-43: John B. Harris, Macon, President; A. J. Henderson, Canton, Vice President; Chas. J. Bloch, Macon, Secretary-Treasurer; and Bending M. Grice, Macon, Assistant Secretary-Treasurer.

CHAS. J. BLOCH,
Secretary

Iowa State Bar Association

HONORABLE Hatton W. Sumners, Chairman of the Judiciary Committee of the House of Representatives, and Honorable John J. Parker, United States Circuit Court of Appeals, Fourth Circuit, were the principal speakers at the forty-eighth annual meeting of The Iowa State Bar Association held in Des Moines, Iowa, June 4, 5 and 6.

Congressman Sumners told the members of the Association that the American people are entitled to the



E. W. McMANUS, President
Iowa State Bar Association

truth about our serious situation in the war and that "difficulties in popular government are what make of people good governors; not living in a fool-proof, self-perpetuating system of perfection which we have so long been trying to deceive ourselves into believing was left us by the Founding Fathers." His special message to lawyers was that their tremendous responsibility in our time is to guide the people back to the great principles of freedom, these people who "must be a great people or fail."

Speaking at the annual banquet, Judge Parker emphasized that nothing must interfere with the lawyer's contributions to the war effort and public morale, but that "we must not forget that one of the most important services that we can render in this period of crisis is to see that justice is administered efficiently."

Other features of the meeting, which was attended by more than eight hundred lawyers, were a stirring message by the retiring president, W. A. Smith of Dubuque, a symposium on "The World at War," an informal address to the Junior Bar Section by Philip H. Lewis of Topeka, Kansas, Chairman of the National Junior Bar Conference, a stag sponsored by the bar of Polk County, the annual law school luncheons, a luncheon for visiting ladies, and the reports of important committees.

Officers elected for the coming year were E. W. McManus of Keokuk, President; D. M. Kelleher of Fort Dodge, Vice President; and B. B. Druker of Des Moines, Librarian. Paul B. DeWitt was given a leave of absence as secretary to enter active service as a lieutenant in the United States Navy, and Wendell B. Gibson of Des Moines was selected as acting secretary.

The Association adopted Articles of Incorporation and will function henceforth as a non-pecuniary corporation under the laws of Iowa.

WENDELL B. GIBSON,
Acting Secretary

Bar Association of the State of New Hampshire

THE annual meeting of the Bar Association of the State of New Hampshire was held at Manchester on June 27. President Henri A. Burque presided, and delivered the president's annual address at the morning session. Following this address, the reports of committees were given. The executive committee was constituted an advisory committee to instruct the treasurer concerning the expenditure of income of the association in war savings bonds. The afternoon session was devoted to a legal institute



BURT R. COOPER, President
Bar Association of the State of
New Hampshire

addressed by Professor Frank L. Simpson of the Boston University Law School on the subject of "Legal Education."

Speakers at the annual banquet were Frank M. Totton of the Chase National Bank, New York City and Hon. Charles H. Donahue, Associate Justice of the Supreme Judicial Court of Massachusetts.

The following officers were elected: President, Burt R. Cooper, Rochester; Vice President, Hon. Elwin L. Page, Concord; and Secretary-Treasurer, Albert H. White, Manchester. Robert W. Upton of Concord was elected delegate to the House of Delegates of the American Bar Association.

New Jersey State Bar Association

THE annual meeting of the New Jersey State Bar Association was held on May 22 and 23, 1942, at Atlantic City, New Jersey. The President, Milton M. Unger of Newark, presided at all of the sessions, each one of which was well attended.

Most of the discussions, of course, were centered on the war and how the work of the various committees has been fitted into this effort, but several committee reports indicated that the work needed to keep our profession and our association moving forward is not being neglected.

Richard Hartshorne of Newark, who acted as chairman of the Committee on National Defense after Major Joseph H. Edgar of New Brunswick, its former chairman, had been called to service, gave a report that showed the comprehensive scope of that part of the war effort. The committee outlined the three-fold manner in which it is working: helping the lawyers in service; helping the service men with their legal problems; and cooperating with the American Bar Association. This committee prepared four articles covering the Soldiers' and Sailors' Act which were widely publicized in newspapers throughout New Jersey and adjacent states and later put in

pamphlet form for distribution to members of the association.

Committees working on problems of rules and procedure in the various courts reported success to some degree in bringing about reforms in this line. This is one of the foremost questions in New Jersey where judicial reform by amendment to the constitution is being widely discussed.

The six sections of the association are very active and reported sustained interest particularly in problems which have arisen because of the war.

The annual association luncheon on Friday was under the direction of the Insurance Section this year. This section presented Hon. Frederic R. Coudert, Chairman of the Coudert-Rapp Committee of the New York State Legislature, which investigated subversive activities in the schools of that state, who spoke on some interesting phases of international relations which will have to be met presently.

A new Committee on Economic Status of the Bar in New Jersey, of which William Elmer Brown of Atlantic City is Chairman, recommended that the association attempt to have only lawyers permitted to appear before quasi-judicial boards and commissions, and only those

from New Jersey to appear in that state. This recommendation was unanimously adopted. The economic status of the profession has received much attention from the association for many years, and the survey recently concluded has become a basis for similar studies in other states.

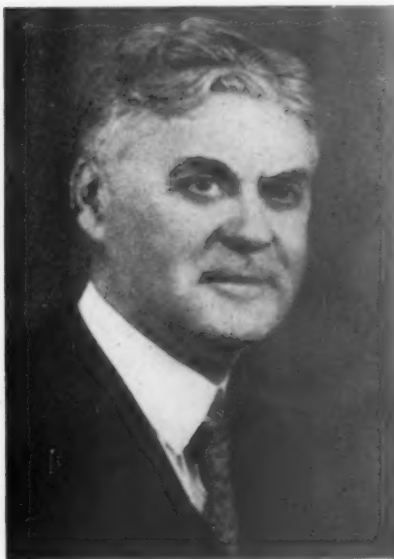
The Roll of Honor of those members of the association who have gone into the service of their country is an ever-lengthening list with no gold stars as yet.

The annual banquet on Saturday evening was marked by the presentation of the association's Medal for Meritorious Service to the Profession and the Association to the Chief Justice of the New Jersey Supreme Court, Thomas J. Brogan of Jersey City. The presentation was made by Hon. Robert Carey.

Leonard J. Dreyfuss of Short Hills, Director of Civilian Defense of New Jersey, outlined the plans of his committee and suggestions for the association's cooperation in assuring the safety of the people of New Jersey. He complimented the members who are serving on a special advisory committee to deal with legal questions, which committee had drawn the Act setting up the present Defense Council.

The principal address was made by Hon. Hatton Sumners, Chairman of the Judiciary Committee of the House of Representatives, who urged lawyers to acquaint themselves first, and then the laymen of the country, with the seriousness of the war situation. He said the people must be aroused to the realization that, although it is not probable, it is possible, for this country to lose the war.

New officers elected at the meeting were: William J. Connor of Trenton, President; Augustus C. Studer, Jr. of Montclair, David M. Klausner of Jersey City and Albert A. F. McGee of Atlantic City, Vice Presidents; Emma E. Dillon of Trenton, Secretary; and Joseph J. Summerill, Jr. of Camden, Treasurer.



WILLIAM J. CONNOR, President
New Jersey State Bar Association

EMMA E. DILLON
Secretary.

Massachusetts Bar Association

THE thirty-first annual meeting of the Massachusetts Bar Association was held on May 9, 1942, on the second day of the first "Massachusetts Lawyers' Institute" at Swampscott, to which all the lawyers of Massachusetts were invited, whether members of the association or not.

The following officers were re-elected for the ensuing year: President, Mayo A. Shattuck of Hingham; Vice Presidents, Hon. Franklin T. Hammond of Cambridge, Harold S. R. Buffinton of Fall River, Edwin P. Dunphy of Northampton, Guy Newhall of Lynn and Charles T. Tatman of Worcester; Secretary, Frank W. Grinnell of Boston; and Treasurer, Horace E. Allen of Springfield.

The following facts were reported:

In the Spring of 1941, a referendum by postal ballot was conducted on the question of "bar integration." Circulars were sent to all lawyers in the state—about 9500. About 3000 answers were received, of which about 2000 favored integration and about 1000 opposed. 6000 did not answer.

About one year ago, as a result of the depression of the past ten years, the membership had dropped from about 1250 to about 650 members. During the past year about 400 new members have joined. Activities of the association have been broadly expanded. In November of 1941, new central headquarters were opened at 5 Park Street, Boston, overlooking the Common, and have been completely furnished by the generous contributions of members of the association. This is the first "home" that the organization has ever had.

Committee work has been greatly expanded and the association now has the following committees which have been actively engaged in their respective fields for the past six or eight months: Membership Committee; Committee on Family and Probate Law and Procedure; Committee on Proposed Code of Evidence of the American Law Institute; Committee on Public Relations; Com-

mittee on Legislation; Committee on Administrative Law and Procedure; Committee on Youth Correction and Authority Act; and newly revamped Grievance Committee.

On May 8 and 9, 1942, the association sponsored the first Massachusetts Lawyers' Institute at Swampscott. The institute was attended by 500 members of the bar. There was an interesting program, and it is expected that this institute will be followed from time to time by others in different parts of the state.

At the institute, addresses were made by Attorney General Robert T. Bushnell on "Powers of the State Government in War Time"; by United States Attorney Edmund J. Brandon on "Federal War Time Statutes and Their Effect"; and by Hon. Hugh D. McLellan on "Prospects of the Bar in War Time and Afterwards." Open discussions were conducted by the Special Committee on Probate Practice, of which Guy Newhall of Lynn, President of the Essex Bar Association, is Chairman, and by Hon. John V. Spalding of the Superior Court, Chairman of the Committee on the "Code of Evidence" of the American Law Institute, and Professor Edmund M. Morgan, the reporter of the Code.

At the banquet the speakers were Hon. John J. Parker of North Carolina, President Shattuck, Raymond S. Wilkins of the Governor's Council, and Chief Justice Field.

FRANK W. GRINNELL
Secretary.

Minnesota State Bar Association

THE annual meeting of the Minnesota State Bar Association was held at St. Paul on June 25-26, 1942, with approximately 750 members in attendance. President Donald S. Holmes of Duluth presided.

The annual meeting of the District Judges' Association preceded the convention, and was held on June 23 and 24.

The Board of Governors of the Minnesota State Bar Association held



JAMES A. GARRITY, President
Minnesota State Bar Association

two breakfast meetings. James A. Garrity of Moorhead, was unanimously elected President; and W. W. Gibson of Minneapolis unanimously elected Vice President. Horace Van Valkenburg of Minneapolis, and J. Neil Morton of St. Paul, were re-elected Secretary and Treasurer respectively.

The Board of Governors also passed a resolution permitting the waiver of dues for men in the armed forces in cases where the local treasurer certifies to the state association that such is the fact.

The address of welcome at the opening of the business session was given by Joseph W. Finley of St. Paul, President of the Ramsey County Bar Association, and a fitting response was made by T. O. Streissguth of New Ulm.

Charles W. Briggs of St. Paul was General Chairman of the Annual Meeting Arrangements Committee, and did a splendid piece of work handling the large crowd in attendance.

George I. Haight of Chicago addressed the group on the subject of "Civil Rights in War Times," an exceedingly interesting address.

The business program was varied

to the extent that a "How" program was conducted by Emerson R. Lewis and Rollin B. Mansfield of the Chicago Bar Association. This in effect was a dramatization of the actual work of preparing a will with trust provisions.

The second morning was devoted exclusively to an institute to consider the Proposed Code of Evidence of the American Law Institute. Wilbur H. Cherry of the University of Minnesota Law School explained and discussed the Proposed Code in its present form and this undoubtedly was of very practical interest to the lawyers of the state.

An innovation at this year's meeting was the large luncheon for lawyers interested in "Title Standards." This luncheon and program were under the direction of Francis J. Nahurski of St. Paul, Chairman of the Real Estate Committee, and Carroll G. Patton of Minneapolis, Chairman of the Sub-Committee, Title Standards. This subject apparently is of current and practical interest to all lawyers in the state, and the discussion would indicate that the coming year will see close cooperation among lawyers in every district of the state in developing standards for title examination.

Hon. William L. Vandeventer of Springfield, Missouri, the only speaker at the annual banquet, entertained the large group with his humorous and practical discussion of lawyers and doctors.

The highlight of the session was the appearance of Dr. Walter Judd of Minneapolis, who held an overflow crowd in suspense while he described his experiences in the Orient and predicted what we might expect in the future, using the subject, "Japan—Our Enemy in the Pacific."

The entertainment arranged for Friday evening at the St. Paul Athletic Club was in keeping with the ability of Ramsey County to genuinely put on a buffet dinner with all the trimmings.

BERT MCKASY
Executive Secretary



CHARLES F. ENGLE, President
Mississippi State Bar

Mississippi State Bar

It was quite fitting that the Mississippi State Bar should hold its annual meeting this year, June 10-12, in historic Biloxi, where battles have been fought and won, and carry to a successful conclusion the patriotic theme of its Victory Program.

President Alexander Currie in his stirring address declared that "there should be but one national hope and ambition, and that, the perpetuity of our government as presently constituted." He reminded us that "our profession is charged with the responsibility to lead the people into a full realization and appreciation of the great heritage that is ours and to fully enlighten them as to how easily we may lose the fruits of the past centuries."

Judge Camille Kelley of the Juvenile Court of Memphis, Tennessee, described "Our Children in a World at War." She impressed us with the fact that not only men and women are fighting and paying for this war but the children as well, and the children, perhaps, more dearly. Judge Kelley regards the juvenile court as a scientific court, a moral clinic, and believes it to be the most important court in the world.

An address by George A. Wilson, Chief Counsel of Standard Oil of Louisiana, Shreveport, now with the Office of Petroleum Coordinator for National Defense, Washington, on "Property Rights and the Law of Oil and Gas" was enthusiastically received.

Fifteen committee reports were heard at the afternoon session and were followed by addresses on "The Origin, Growth and Preservation of Democracy" by Carl Marshall of Gulfport, and "The Lawyer's Part in the Great Defense Problems of Today" by Dean T. C. Kimbrough of the University of Mississippi Law School. These addresses were inspired by patriotism and urged the lawyers into active participation in the various phases of the war effort.

Walter P. Armstrong of Memphis, President of the American Bar Association, was guest speaker at the annual banquet held Thursday evening. He stressed the responsibilities of citizenship and the emphasis that should be placed upon that responsibility.

The annual past presidents' breakfast was held Friday morning, June 12, with Judge T. C. Kimbrough, President of the Past Presidents' Club, presiding.

Frank E. Everett, Jr., of Vicksburg, was selected chairman of the Junior Bar Section for the ensuing year, and John W. Wade of the University of Mississippi was chosen as vice chairman.

The feature of the Friday morning program was the address of United States Senator Claude Pepper of Florida, as he discussed "A Democracy Totally Mobilized to Win the War."

The election of officers for the ensuing year concluded the program. Those chosen to carry on the work of the association were: Chas. F. Engle of Natchez, President; Ross R. Barnett of Jackson, Vice President; and Eugene Thompson of Marks, Second Vice President. W. Eugene Morse was elected to serve as State Bar Delegate of the House of Delegates of the American Bar Association.

Alice Nevels
Secretary

Pennsylvania Bar Association

THE 48th annual meeting of the Pennsylvania Bar Association was held at Atlantic City, New Jersey, June 30, July 1 and 2.

President Fred B. Gerner of Allentown, reported a year of intense activity, he having attended 58 zone and local bar association meetings.

In keeping with the times, the fundamental issues discussed were all closely related to the war effort.

The president's address was devoted to the origin of the Bill of Rights and an analysis of the various steps in Democracy. The preservation of these rights is the keystone of desire of freedom-loving people today. The bar is in the vanguard of this movement. It must maintain that leadership.

The annual address was delivered by Honorable John G. Jackson, President of the New York Bar Association, who synchronized perfectly with President Gerner's address by devoting his efforts into an analysis of present day trends and an attempt to translate those tendencies into the future of the law and civilization.

One of the most practical items discussed was the working of the Selective Service System in Pennsylvania. Led by Chairman Joseph W.



JOHN C. ARNOLD, President
Pennsylvania Bar Association

Henderson of the Committee on National Defense, the following officers participated in the discussion: Colonel B. F. Evans, Acting Director of Selective Service for Pennsylvania; Lt. Colonel George H. Hafer, Chief of Legal Division of Pennsylvania Selective Service; and Lt. Colonel Edward S. Shattuck, General Counsel, National Selective Service System. Colonel Evans in addressing the Association expressed great gratitude for the voluntary cooperation of the legal profession in Pennsylvania.

Chairman Litke of the Committee on Minor Judiciary presented a voluminous report containing the findings of fact of his committee with the announcement that specific recommendations would follow in due course.

For the Annual Dinner, President Gerner selected two outstanding speakers on timely subjects, Dr. Raoul Herrera-Arango, Secretary of the Cuban Embassy, discussed our relations with Central and South America and the importance of the work of the Inter-American Bar Association in these critical times. Honorable C. Wayland Brooks, United States Senator from Illinois, analyzed the critical condition of affairs today and issued a ringing challenge to the members of the association as individual citizens and lawyers to throw everything they have into the war effort.

Generally speaking the entire trend of the meeting was the curtailment of all non-essential bar association work and the placing of greater stress upon fundamental efforts.

The following officers were elected for the year 1942-1943: President, John C. Arnold, of Clearfield; Vice President, Wm. Clarke Mason, of Philadelphia; Secretary, John McI. Smith, of Harrisburg; and Treasurer, Fidelity-Philadelphia Trust Company of Philadelphia.

Delegates to the House of Delegates of the American Bar Association: John C. Arnold and John McI. Smith.

JOHN McI. SMITH,
Secretary.



CLAUDE E. CARTER, President
State Bar of Texas

State Bar of Texas

"WE should insist that our children learn something of history so that demagogues may not cheat them of their hard-won liberties, just as we insist that they learn something of arithmetic so that sharpers may not shortchange them of their hard-earned dollars," Associate Justice Robert H. Jackson of the United States Supreme Court told the State Bar of Texas at its annual banquet July 3.

Others on the program of the convention in San Antonio July 2-4 were Walter P. Armstrong, president of the American Bar Association; Sam Bratton, Federal Circuit judge of New Mexico; Congressman Hatton W. Sumners of Dallas; and Col. J. E. Morrisette, Judge Advocate of the Eighth Corps Area.

Claude E. Carter of Harlingen, elected June 5 by ballots mailed to all Texas lawyers, succeeded Major Gordon Simpson of Tyler as president. Major Simpson has been with the Judge Advocate General's Department in Washington since June 7, but was given leave to attend the convention. Major T. Bell of Beau-

mont is the new Vice President, and C. C. Renfro of Dallas is Chairman of the Board of Directors.

Deploring the indifference toward American history revealed in a recent *New York Times* survey of schools and colleges, Justice Jackson declared: "History is to a people what memory is to an individual. As lawyers know, the institutions, customs, and policies of the present can be understood or appraised only by examination of their historical origins."

Mr. Armstrong explained an American Bar Association plan for bringing home to the American people a thorough appreciation of their history and institutions, by sending its members to speak before organizations and working groups. "There can be no better immunity against the Circe-like appeal of alien ideologies," he said.

Speaking July 3 on the war work of the American Bar, President Armstrong pointed out the importance of contributing to a strong public opinion. "There is a tendency today on the part of many who should be leaders to follow public opinion rather than to attempt to mold it," he asserted. "The bar must counteract subversive opinions as well as subversive activities."

In spite of wartime restrictions, registration figures showed an attendance of 1,405 lawyers and their guests at the convention. Of that number, 851 were from out of town.

Adopted after lively discussions on the floor of the general assembly were: a resolution calling for a world court after the war, submitted by the 1911 Law Class of the University of Texas, and a report of the criminal law and procedure committee, given by James K. Evetts of Belton.

The report asked that the State Court of Criminal Appeals be given the power to write rules of criminal procedure, as the Supreme Court had been given the power in civil proceedings; that the jurisdiction and membership of the Texas Civil Judicial Council be increased to allow the study of criminal matters; and that a statute be passed providing

TIRE RATIONING

for continuous terms in Texas district courts.

Seventeen committee reports were considered and adopted at the morning sessions. The afternoons were devoted generally to the American and Texas committees on improving the administration of justice, and meetings of the seven sections of the State Bar of Texas.

The Junior Bar voted to affiliate itself with the Junior Bar Conference of the American Bar Association.

The session which probably aroused the greatest interest and the most comment was a forum, conducted by members of the Judge Advocate General's Department for the Third Army, on how lawyers could get into the Army and how they could aid at home through local war work committees.

Six officers and representatives of the Mexican Bar Association were guests of the State Bar of Texas. "We made the trip from Mexico City,"

said Vice President Carlos Sanchez Mejorado, "because we think it is the duty of every Mexican and every American citizen, especially at this time, to try to bring our two peoples closer together, and we do not find there is any better way of doing it than by personal contact."

James L. Shepherd, Jr. of Houston, Leo Brewer of San Antonio, and Harry P. Lawther of Dallas were elected to the American Bar Association's House of Delegates.

INFORMATION IN RE TIRE RATIONING SOUGHT FROM ASSOCIATION MEMBERS

President Walter P. Armstrong has sent the following letter to the presidents and secretaries of all state and local bar associations in furtherance of the compilation of material for the survey undertaken by the Committee on Coordination and Direction of War Effort, as announced on page 451 of the July issue of the JOURNAL.

A form of questionnaire was enclosed with the letter with the request that it be multigraphed and distributed to the members of the Association for the purpose of obtaining information to include in the collation of the data which is to be presented to the Office of Price Administration with a view to securing for the bench and bar an adequate weighing of their requirements, in balance with the needs of other groups in the community.

It is hoped that any members of the American Bar Association interested in this subject will clip out of the JOURNAL the questionnaire printed on page 575, fill it in and mail to Committee on Coordination and Direction of War Effort, 1002 Hill Building, Washington, D. C.

My dear Mr. President:

1. Your official position has probably made you aware of the apprehension of many lawyers that automobile tire and gasoline rationing may interfere with their functioning as officers of the courts. Because this anxiety appears to be nation wide, may be of high importance to the administration of justice, and because the situation arises from the war, this Committee of the American Bar Association appears to be a natural agency to assemble the data which will demonstrate the dimensions of the problems and to present the picture for the entire bar to the rationing authorities: hence this letter.

2. The rationing regulations of the Office of Price Administration are designed to preserve the limited supply of materials for the vital needs of the nation. With respect to rubber, particularly, that office is basing its controls on making transportation available for those persons whose activities are essential to: (1) the war program, (2) public health, and (3) public safety. These classes of eligibles do not seem to include persons, as such, engaged in practicing law. New tires and tubes are now available for the maintenance of public police services, and to enforce laws relating specifically to the protection of public health and safety.

This has been interpreted to include agents of a district attorney's office who use vehicles exclusively for criminal investigations but such vehicle cannot be used to provide transportation to and from court. Judges who use vehicles to go to and from court have been held to be ineligible. County attorneys, district attorneys, city attorneys and others who use vehicles partially, or exclusively, for civil work are ineligible. Recapped tires are available to government employees using the vehicle for transportation or official business where engaged in the performance of a government function essential to the public health, safety or to the war

TIRE RATIONING

effort. Under this provision an automobile is eligible only where it is owned by the government or where the applicant's use entitles him to compensation therefor by the government.

3. If the reported needs in the administration of justice of some of the members of the bar are to be met, it seems necessary to establish a new eligibility classification for them. Achieving this rests upon showing how lawyers are affected, how many are affected, and who these conditions are of sufficient relative importance to the community generally to warrant setting up a new class of rationable eligibles. In the first instance, at least, this requires assembly

of the facts. The contact of your Association with many lawyers leads us to ask that you lend your aid in marshalling those facts. To facilitate that action we enclose a form of questionnaire which you may find useful in collecting from your members the information indicated by the questions.

If you care to secure this information and tabulate it for return to the Committee we will have a basis for determining whether the case for establishing an additional eligibility classification for securing tires may be made out.

While we have been given no encouragement for success in a situation which circumstances appear to

make increasingly difficult of success, we have been assured by the Office of Price Administration of a thorough consideration of whatever presentation may be made.

Our experience in handling this matter of tire rationing should serve as a basis for approaching the gasoline rationing, if and when that situation becomes as acute.

We shall appreciate your early advice whether your Association will undertake to collect the information requested and return it to us.

For the Committee on Coordination and Direction of War Effort

WALTER P. ARMSTRONG
President

QUESTIONNAIRE RE TIRE RATIONING

(A questionnaire to be answered only by those members of this Association who believe that the rationing of automobile tires will materially interfere with their performance of their duties as officers of the courts.)

_____ Bar Association

1. Name _____ Firm Name _____
2. Office Address _____ Age _____
3. Branch office address (if any) _____
4. Nearest County Seat _____
5. Nature of your practice _____
6. In what counties have you tried cases during the year immediately past (State the number of cases after each county seat name.)? _____
7. What transportation facilities exist (a) between your office and nearest county seat _____
(b) between your office and counties where you regularly appear before courts or administrative boards or tribunals or must consult officials or records _____ (c) between your office and your home? _____
8. How many miles have you driven in the year immediately past in carrying on your practice? _____
9. How many automobiles do you now own and operate? _____
10. How many tires do you now own? _____
11. State the present mileage on each tire. _____
12. With what effect, if any, upon your ability to carry on your practice have transportation facilities by rail or bus been curtailed in your vicinity? _____
13. Explain in detail your particular travel needs in carrying on your daily practice, which cannot be met by existing transportation facilities _____

_____ Date

_____ Signature

LETTERS FROM MEMBERS

To the Editor of the JOURNAL:

The Denver Bar Association has a challenge for other bar associations in the nation, namely, longevity in active practice at the bar. Two remarkable representatives of the legal profession, members of the Denver Bar Association, are 91 and 95 years of age respectively, Alexander Lee Doud and Frederick A. Williams. Can any other bar association in any city or group in this country furnish two lawyers still in active practice at these advanced ages?

Both Mr. Doud and Mr. Williams go to their offices daily, meet clients and transact the ordinary business that comes to lawyers. Both are highly honored by their professions and hold life memberships in their local bar associations.

Mr. Doud was born near Morris, Illinois, in 1851 and came to Colorado for his health in 1884. He is a graduate of the Northwestern University Law School (then Union College of Law), class of 1876, the only living member of that class. Lyman Trumbull was one of his teachers. He has never held public office, but his life is crowned with honors and filled with usefulness. He has been a Trustee of the University of Denver for forty-six years, and of the Trinity Methodist Church for fifty-seven years. Mr. Doud was active at tennis until after he was seventy years of age and still plays a round of golf several times a week, making a score much better than average players and beginners.

Mr. Williams, a native of Massachusetts, from old Revolutionary stock, took his law in New York state and moved to Denver in 1882. He was twice elected city attorney of Denver and has participated in some of Colorado's most important litigation. He is an active Trustee of the



A. L. DOUD

F. A. WILLIAMS

Presbyterian Church in Denver.

Granting that the law is "a jealous mistress," both men give an affirmative answer to these questions: Can a lawyer enjoy a long span of life? Can he be honest and effective as a citizen? Does life have compensations for those who follow the law?

Incidentally, Frederick A. Williams is not related to the writer.

WAYNE C. WILLIAMS
Denver, Colorado

To the Editor of the JOURNAL,

In *State Tax Commission of Utah v. Aldrich, et al. Administrators*, decided on April 27, 1942, and reported in U. S. Law Week for April 28, 1942, the Supreme Court of the United States overruled *First National Bank v. Maine*, 284 U. S. 312, which decided that intangible property represented by shares of stock was subject to inheritance taxes only at the domicile of the deceased, and sustained an inheritance tax by Utah,

the state of incorporation, on the shares held by the decedent, who was domiciled in New York. Mr. Justice Jackson dissented in a most interesting opinion concurred in by Mr. Justice Roberts. This dissenting opinion begins as follows:

State taxation of transfer by death of intangible property is something of a jurisdictional snarl, to the solution of which this Court owes all that it has of wisdom and power. The theoretical basis of some decisions in the very practical matter of taxation is not particularly satisfying. But a switch of abstract concepts is hardly to be expected without at least careful consideration of its impact on the very practical and concrete problems of states and taxpayers. Weighing the highly doctrinaire reasons advanced for this decision against its practical effects on our economy and upon our whole constitutional law of state taxation, I can see nothing in the Court's decision more useful than the proverbial leap from the frying pan into the fire.

Mr. Justice Jackson then points out that, as the Court is dealing with business fictions when it discusses such intangible property as corporate shares, the majority opinion simply discards a simple, reasonable fiction which every one can understand and apply, and substitutes

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LETTERS FROM MEMBERS

multiple fictions which nobody can understand or apply with any approach to justice. He says:

The effect of the court's decision is to intensify the already unwholesome conflict and friction between the states . . . in competitive exploitation of intangible property as a source of death duties.

The question naturally arises whether this attitude of the majority is consistent with one of the underlying purposes of the Federal Constitution, which was to form a more perfect union by eliminating, so far as practicable, this sort of cut-throat competition between states.

In his opinion concurring with the majority, Mr. Justice Frankfurter cites Professor James B. Thayer's article on *The Origin and Scope of American Doctrine of Constitutional Law*. I have often wondered, as one of Thayer's students, how far Professor Thayer would have agreed with the present tendencies of the Court in the matter of constitutional law or how far he would have regarded some (not all) of the recent opinions on various subjects as a practical abdication of the judicial function by that Court.

This matter of state taxation of intangibles might be a good subject for the next Ross Essay Competition.

FRANK W. GRINNELL
Boston, Mass.

To the Editor of the JOURNAL:

Congratulations on the cover of the July issue of the JOURNAL.

First of all, the flag adds a fine touch of color. The covers have heretofore been rather drab.

Secondly, may I suggest that for the duration of the war you keep the same cover which you used for the July issue. The words chiseled above the entrance to the Supreme Court Building,

"Equal justice under law,"

make a good slogan for the United Nations as well as the lawyers. This with the flag, which stands for liberty as well as our country, makes a fine combination. To put it another way, we should nail the flag to the mast

and keep it there until victory is won.

GEORGE W. NILSSON

Los Angeles

To the Editor of the JOURNAL:

I have just received my July issue of the AMERICAN BAR ASSOCIATION JOURNAL and hasten to tell you that in my opinion its front cover is so beautiful and inspiring that replicas suitable for framing should be made available to our members, if not the public generally.

It is noted that in the advertisement of the American Law Book Company on the back cover of the same issue, Justice Harlan's stirring language in *Halter v. Hayward* is quoted. As you know, I cited that case in my letter to Representative Sumners of June 10, 1941 in support of Senator Andrews' Bill, S. 218, entitled "An act to prevent the desecration and mutilation of the Flag of the United States." That Bill passed the Senate on April 4, 1941. The attached reprints from the CONGRESSIONAL RECORD will serve to refresh your memory regarding that measure.

JAMES P. MCGOVERN

Washington, D. C.

Sad Judicial Reflection

"Bankruptcy looks to history and not to hopes."—Judge Woolsey in *Re Yarns Corporation*, 57 F. (2d) 309, 312.

Bankruptcy looks to history

And not to hopes.

Bright though they be and glistery,

Bankruptcy looks to history;

Into the morrow's mystery

No Referee gropes.

Bankruptcy looks to history

And not to hopes.

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"AND THE OFFICIAL COURT REPORTER"

At the recent trial before a military commission of German agents on charges of sabotage, great secrecy was imposed. Necessary to the trial, of course, were the commission, the accused, counsel for the prosecution and the defense, the witnesses, and, as revealed by press dispatches, "the official court reporter." Seventy-seven years ago Benn Pitman, famous shorthand reporter and author, reported the trial of those charged with conspiracy in connection with the assassination of President Lincoln—the first use of shorthand in a matter of nationwide interest to receive general publicity. Today it is accepted practice that spoken words, on matters of importance in court, public assembly, business convention or conference, must be recorded.

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